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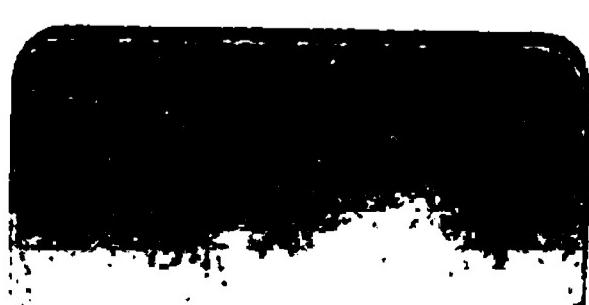
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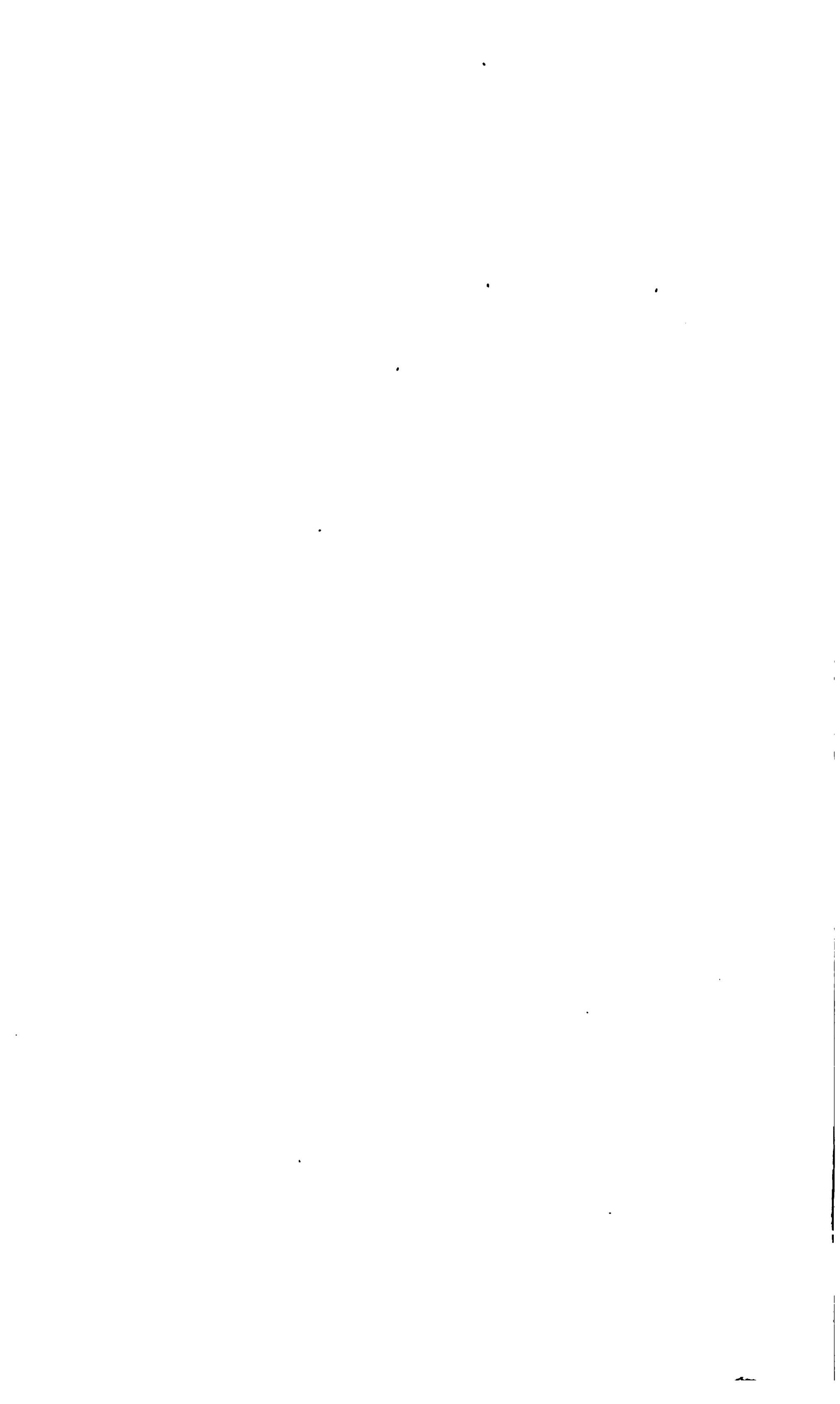
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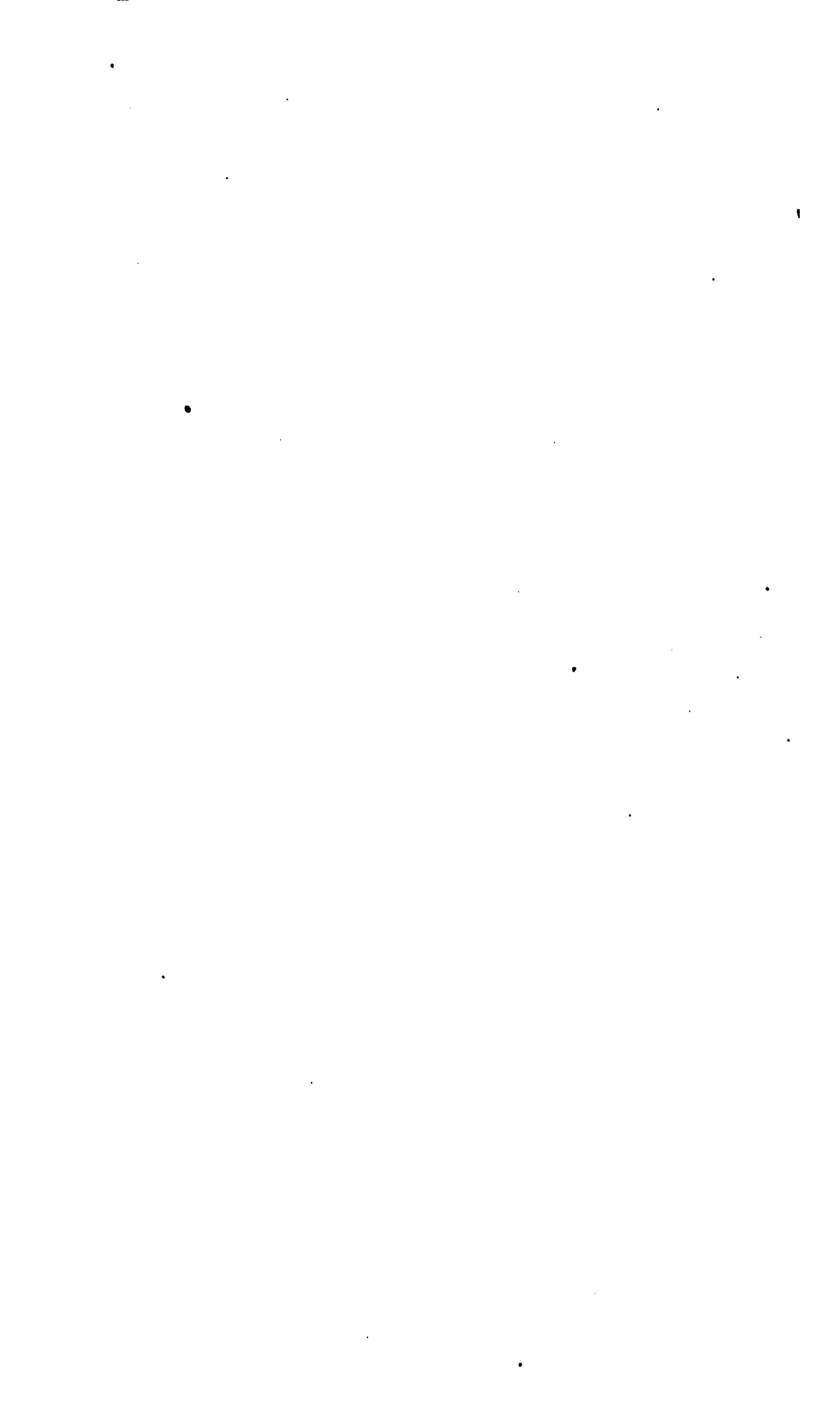
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OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED, AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 75,

CONTAINING CASES DECIDED AT THE MAY TERM, 1881, NOT
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

Hon. GEORGE V. HOWK.*†
Hon. JAMES L. WORDEN.†
Hon. WILLIAM E. NIBLACK.†
Hon. BYRON K. ELLIOTT.‡
Hon. WILLIAM A. WOODS.‡

*Chief Justice at the May Term, 1881.

†Term of office commenced January 1st, 1877.

‡Term of office commenced January 3d, 1881.

**OFFICERS
OF THE
SUPREME COURT.**

**CLERK,
JONATHAN W. GORDON.**

**SHERIFF,
JAMES ELDER.**

**LIBRARIAN,
FREDERICK HEINER.**

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA.

Hon. GEORGE A. BICKNELL.*†

Hon. JOHN MORRIS.†

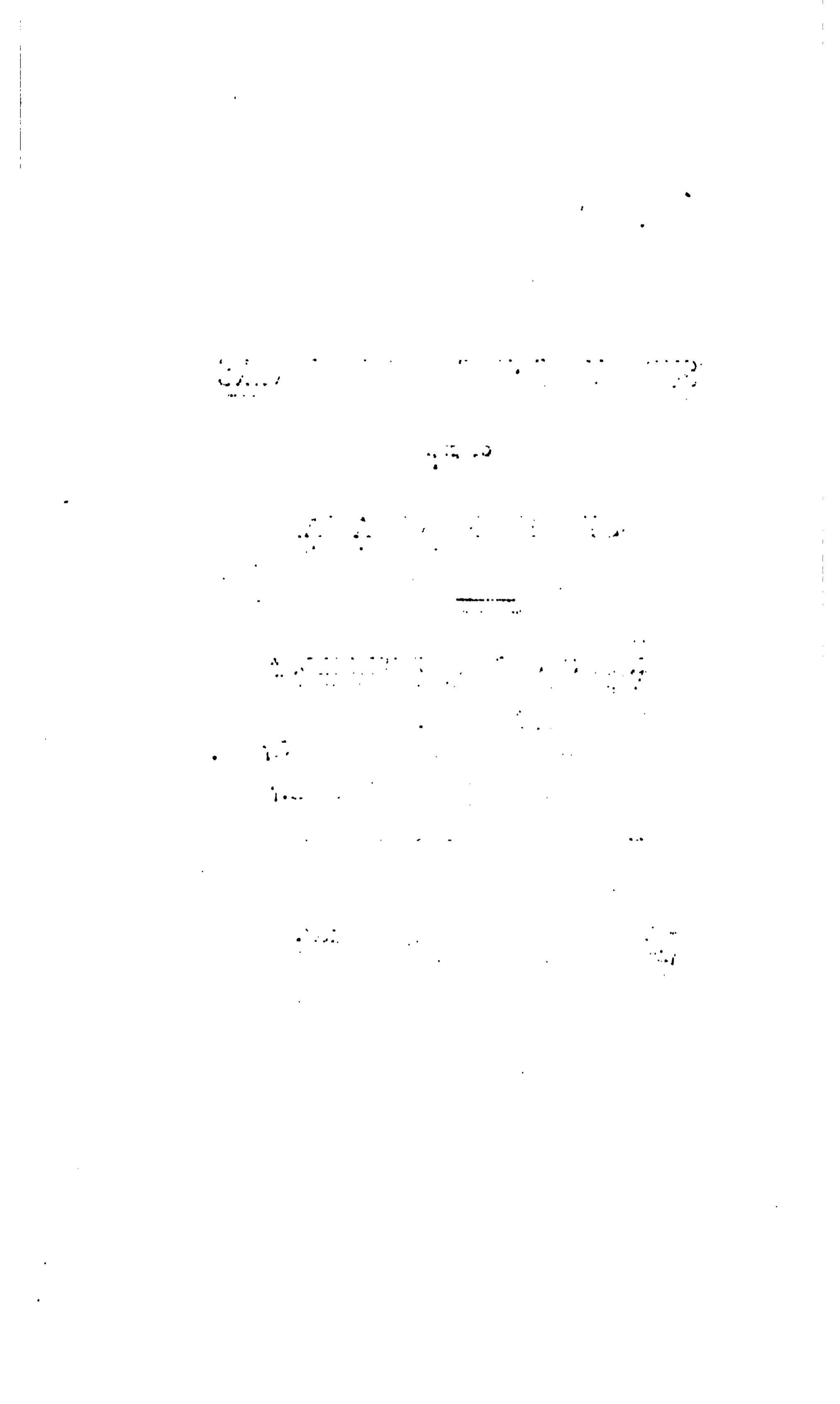
Hon. WILLIAM M. FRANKLIN.†

Hon. HORATIO C. NEWCOMB.†

Hon. JAMES I. BEST.†

***Chief Commissioner at the May Term, 1881.**

†Appointed April 27th, 1881.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1881, IN THE SIXTY-FIFTH
YEAR OF THE STATE.

No. 8757.

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141	16
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THE PHOENIX MUTUAL LIFE INSURANCE CO. v. HINESLEY.

PRACTICE.—*Action on Policy of Life Insurance.—Complaint.—Evidence.*

Instructions.—Where, on the trial of an action upon a policy of life insurance, evidence was given tending to establish the substance of the matters in issue, it was not error of the trial court to refuse to give an instruction that “The evidence entirely fails to support the second paragraph of complaint, and the plaintiff can not recover upon that paragraph of her complaint,” and an instruction that “The evidence entirely fails to support the material allegations of the said fourth paragraph of the complaint, and the plaintiff can not recover under that paragraph.”

SAME.—*Performance of Contract.—Notice.*—Where one party to a contract gives notice to the other of his determination not to perform on his part, performance by the party receiving such notice is unnecessary.

SAME.—*Variance.—Amendment.—Premium Note.*—A variance between premium notes as described in the complaint and as given in evidence is not fatal, where they are by their terms not payable until a cause of action has accrued in favor of the maker upon the policy of insurance issued to

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him by the payee, although the interest be payable annually in advance. Besides, it might have been obviated by amendment, which the Supreme Court will regard as having been made.

SAME.—*Verdict.—Weight of Evidence.—Supreme Court.*—The Supreme Court will not disturb the verdict of a jury upon the weight or preponderance of the evidence.

LIFE INSURANCE.—Modification of Policy.—Violation of Modified Terms.—It is competent for the parties to a policy of life insurance to modify or change its terms in regard to the payment of the annual premium; and if the insurer violate and fail and refuse to comply with the modified terms of the policy, a cause of action accrues thereon in favor of the assured, if he be not in default.

SAME.—Pleading.—Practice.—Allegations and Proof.—Substantial Averments.—Substance of Issue.—The rule that a party must recover upon the allegations of his pleadings *secundum allegata et probata*, or not at all, does not require that all of the most substantial averments of a complaint must be proved, or that there must be evidence tending to prove them, in order to justify a refusal of an instruction that plaintiff is not entitled to recover. A plaintiff is not bound to prove every allegation of his complaint; it is sufficient if he establish the substance of the issue.

SAME.—Evidence.—Variance.—Where the plaintiff's evidence on the trial showed that for seven consecutive years the premiums on the policy were paid after they were due, instead of ten as alleged, it fairly tended to establish the substance of the issue, although it did not cover the full period of ten years, as alleged.

SAME.—Evidence.—Waiver.—Foreign Insurance Company.—Notice to General Agent is Notice to Company.—Where a foreign insurance company has a general agent in this State, who superintends and manages its insurance business in the State, collects premiums and countersigns receipts given for premiums paid to him, notice to such agent that premiums were paid by consent and waiver after they were due, and in relation to any other business of insurance transacted by him for his company, is notice to the company.

From the Marion Superior Court.

J. E. McDonald, J. M. Butler, G. C. Butler and F. B. McDonald, for appellant.

F. M. Finch and J. A. Finch, for appellee.

Howk, C. J.—This was a suit by the appellee against the appellant upon a policy of insurance, issued to the appellee upon the life of her husband, one William Hinesley. The policy was in the sum of twelve hundred dollars, was dated

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at the city of Hartford, Connecticut, on the 6th day of February, 1862, and, on the 12th day of the same month and year, was countersigned by the appellant's agent, at Terre Haute, Indiana. The cause having been put at issue was tried by a jury in the court below at special term, and a general verdict was returned for the appellee assessing her damages in the sum of \$1,243.98 ; and with their general verdict the jury also returned into court their special findings as to particular questions of fact, submitted to them by the parties under the court's direction. The appellant's motions for a judgment in its favor on the special findings of the jury, notwithstanding their general verdict, and for a new trial, were severally overruled by the court, and its exceptions were duly saved to each of these rulings ; and judgment was rendered for the appellee upon and in accordance with the general verdict. On an appeal to the court below in general term, the judgment at special term was in all things affirmed ; and from this judgment of affirmance this appeal is now here prosecuted.

By a proper assignment of error, the appellant has brought before this court the errors assigned by it in the general term of the court below. These errors present for the decision of this court the following questions :

1. As to the sufficiency of the second and fourth paragraphs of complaint ;
2. As to the correctness of the court's decision in overruling appellant's motion for a judgment in its favor on the special findings of the jury, notwithstanding their general verdict ; and,
3. As to the correctness of the court's decision in overruling the appellant's motion for a new trial.

In their brief of this cause, the appellant's learned counsel have discussed these several questions, in the inverse order of their statement, and in the same order we will consider and decide these questions. The first point made by

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counsel in argument is, that the court erred in its refusal to give the jury the fourth instruction asked by the appellant, which instruction reads as follows :

"Fourth. The evidence entirely fails to support the second paragraph of complaint, and the plaintiff can not recover upon that paragraph of her complaint."

It is necessary, we think, to the proper presentation of the point thus made by counsel, and to a clear understanding of our decision, that we should give, in this connection, a summary at least of the facts alleged in the second paragraph of the complaint. In this paragraph the appellee alleged, in substance, that, on the 6th day of February, 1862, the appellant issued a policy of life insurance, by which it promised to pay the appellee, in consideration of her payment of the annual premium of \$29.52, the sum of twelve-hundred dollars, within ninety days after due notice and proof of the death of her husband, William Hinesley ; that, by the terms of said policy, the said premium was payable on or before the 6th day of February of each year, but was in fact not collectible then, or until the appellant had given appellee notice of the amount of the reduction thereof by dividend, and notice to pay the same ; that the appellant did not require payment on the said day, but for ten years before the death of said Hinesley allowed the same to be paid at any time within sixty days after said date ; that the appellant would send notice to appellee each year when the said money was payable by the terms of the policy, but agreed to receive and did receive the same at any time within sixty days thereafter, except as hereinafter stated ; that this method of delayed payment was the constant and regular custom of the appellant toward the appellee and was so understood and relied upon by her, as the appellant well knew ; that the appellee did not pay or tender any premium on said policy, for the year preceding the death of said Hinesley, until after the same was due by the terms of said policy,

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and until after notice from the appellant that the same was payable ; that, when said premiums were so tendered and paid, they were received by the appellant without objection, in accordance with its said custom ; that the appellee relied upon the appellant's said custom to notify her when said premium was payable, and to receive the same within sixty days after the same was payable by the terms of said policy, as she reasonably might, and did not pay or tender in payment any premium, until notice was received by her concerning the same, and within sixty days thereafter, of all which the appellant had full knowledge and consented thereto, thereby waiving any right to demand payment on the day named in said policy ; that the appellant having allowed the appellee to so pay, and having regularly notified her of the time when said premium was payable and the amount due at each payment, became lawfully required to give such notice and to receive the said premium within sixty days thereafter, and could not lawfully demand payment without having given such notice, and before the expiration of sixty days thereafter could not forfeit said policy for the non-payment of said premium ; that the appellant, disregarding its said custom and the appellee's rights, negligently, wilfully and fraudulently failed and refused to give the appellee any notice of the amount due by the terms of said policy on February 6th, 1875, until after said date, and then gave said notice to appellee, who immediately thereafter tendered the amount due as the premium for that year, which the appellant fraudulently and without right refused to receive, and thereafter fraudulently declared the said policy forfeited and void ; that the said William Hinesley died on the 24th day of October, 1876, of which due notice and proof were given the appellant on March 9th, 1877, and the appellant refused to pay the said sum of twelve hundred dollars, or any part thereof. Wherefore, etc.

The gist of this paragraph of the appellee's complaint,

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as we read its allegations of fact in the light of the law applicable thereto, may be thus stated: While it was conceded that the annual premium, by the terms of the policy in suit, was payable on or before the 6th day of February in each year, yet the appellee claimed and in substance alleged, that the terms of the policy had been so far modified and changed by the conduct and agreement of the parties thereto, as that such annual premium should not become payable until the appellant had given the appellee notice thereof, and of the amount of the payment, after deducting the annual dividend, and that such payment might be made at any time within sixty days after such notice, without any forfeiture of the policy. It was competent for the parties to the policy of insurance to modify or change its terms in regard to the payment of the annual premium, both as to the amount and the time of such payment, in the manner claimed by the appellee in the second paragraph of her complaint; and if, as alleged, the appellant violated the modified terms of the policy, and failed and refused to comply therewith, and declared the policy forfeited upon a tender of performance by the appellee of her part of the modified contract, there can be no doubt, we think, that a cause of action accrued to her against the appellant upon the policy as modified. Whether or not the policy in suit was modified or changed by the conduct or agreement of the parties, in the manner claimed by the appellee, and whether or not, upon a tender of performance by the appellee of her part of the modified contract, the appellant failed and refused to comply with the terms of the modified policy, and declared the same forfeited;—these were questions of fact for the consideration and determination of the jury, upon the evidence adduced before them.

In the fourth instruction asked by the appellant, which we have heretofore quoted, it will be seen that the court was requested to charge the jury that the evidence entirely

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failed to support the second paragraph of the complaint, and the appellee could not recover thereon. In discussing the alleged error of the trial court, in its refusal to give this fourth instruction, appellant's counsel first give a statement of what they term "the most substantial averments" of the second paragraph of the complaint, in substance, as follows:

"It will be observed that here is a very elaborate attempt to show a waiver of the conditions of the policy as to time of paying premiums, by averring a long continued custom to permit payments of premiums at any time within sixty days after due;

"Not only a long continued custom, but an agreement to receive premiums at any time within sixty days after due by the terms of the policy;

"Not only such an agreement, but the actual receipt by the appellant of premiums at any time within sixty days after due, for a period of ten years;

"Not only such receipt, but full knowledge upon the part of the company, that the premiums had not been paid till after due;

"Not only such custom and knowledge, but reliance by appellee on such custom, and knowledge by appellant of such reliance by appellee."

Having given this statement of some of the most substantial averments of the second paragraph of the complaint, "showing a waiver of some of the conditions of the contract, or a change in the terms of the contract," the appellant's counsel say of these averments, in argument, that "they must be proved, or at least there must be evidence tending to prove them, in order to justify the court below in refusing the instruction under consideration." In support of their argument, counsel refer us to the rule of law, well and often recognized in the decisions of this court, that a party must recover upon the allegations of his pleadings, *secundum allegata et probata*, or not at all. *McAroy v.*

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Wright, 25 Ind. 22; *Boardman v. Griffin*, 52 Ind. 101; *Terry v. Shively*, 64 Ind. 106.

The soundness of this rule of law can not be questioned; but the appellant's counsel err, as it seems to us, in their application of the rule to the case made by the second paragraph of appellee's complaint. Certainly this rule of law did not require that all of the most substantial averments of the paragraph, as counsel have stated and termed them, must be proved, or that there must have been evidence tending to prove them, in order to justify the trial court's refusal of the instruction under consideration. Under the rule, as we understand it, the appellee was required to prove, or to introduce evidence tending to prove, the substance of the matters in issue; that is, that the terms of the policy in suit had been so far modified, by the conduct and agreement of the parties thereto, as that the annual premium should not become payable until the appellant had given the appellee notice thereof, and of the amount of the payment, after deducting the annual dividend, and that such payment might be made at any time within sixty days after such notice, without any forfeiture of the policy. In *Long v. Doxey*, 50 Ind. 385, this court said: "It is only necessary for a plaintiff to prove so many of the facts alleged by him as amount to or constitute a cause of action." In the recent case of *Owen v. Phillips*, 73 Ind. 284, on p. 293, ELLIOTT, J., speaking for the court, said: "The appellants were not bound to prove every allegation of their complaint; it was sufficient if they established the substance of the issue."

In the case at bar, the appellee introduced evidence on the trial, which tended, as we think, to establish the substance of the matters in issue in the second paragraph of her complaint. She had alleged therein, as we have seen, among other things, that the appellant had not required payment of the premium on the day it became due by the terms of the policy, but, for ten years before the death of

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said Hinesley, had allowed the same to be paid at any time within sixty days after it so became due. It is claimed by the appellant's counsel, in their brief, that this allegation was not supported by any evidence; and they apparently claim that the evidence was insufficient, because it showed that the appellant had allowed the premiums to be paid, after they were due, for seven years prior to the death of Hinesley, instead of ten years as alleged. Counsel concede that the appellee's evidence showed that the premiums were paid, after they were due by the terms of the policy, during seven consecutive years, and that these premiums were thus paid, two in four, one in five, one in eight, one in twenty-five, and one in one hundred and forty-five, days after the same became due. It seems to us that this evidence fairly tended to establish the substance of the issue, although it did not cover the full period of ten years, as alleged; and that, from this evidence, the jury might have reasonably inferred and found that the appellant had agreed to receive and had received the premiums, after they became due by the terms of the policy, as appellee alleged in the second paragraph of her complaint.

It is earnestly insisted, that no evidence was introduced tending to sustain the material averment, that the appellant well knew the premiums had not been paid, until after they were due by the terms of the policy. The evidence showed that the appellant, a foreign insurance company, had a general agent at Indianapolis, who superintended and managed its insurance business in this State. Under the statute of this State in relation to foreign insurance companies, the agents of such companies, residing in this State, are authorized to take risks and transact the business of insurance for such companies, within this State. It appeared from the evidence, that the premiums on the policy in suit were paid to the appellant's agents in this State; and, certainly, these agents well knew that the premiums were thus paid, year

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after year, after they were due by the terms of the policy. What these agents well knew, and must have known, in regard to the delay in the payment of the premiums, must be held to be the knowledge of their principal, the appellant. The collection of the premiums was under the management and control of the agents, and the receipts given for the premiums, when paid, were not to be valid until countersigned by the agents, to whom the payments were made. It was held by this court, in *The Pittsburgh, etc., Railway Co. v. Ruby*, 38 Ind. 294, "that notice to an agent of a corporation, relating to any matter of which he has the management and control, is notice to the corporation." It seems to us that this rule of law is especially applicable to the agents of foreign insurance companies, transacting the business of insurance for their companies in this State, and that it must be held that notice to such agents, in relation to any business of insurance transacted by them for their companies, is notice to such companies. *Insurance Co. v. Wilkinson*, 13 Wal. 222; *Miller v. The Mutual Benefit Life Ins. Co.*, 31 Iowa, 216; *Miller v. Phœnix Ins. Co.*, 27 Iowa, 203.

Our conclusion is, that the court committed no error in its refusal to give the jury the fourth instruction, asked by the appellant.

The appellants' counsel also claim, in argument, that error was committed by the trial court, in refusing to give the eighth instruction, asked by the appellant, which reads as follows:

"*Eighth.* The evidence entirely fails to support the material allegations of the said fourth paragraph of the complaint, and the plaintiff can not recover under that paragraph."

It is necessary to a proper understanding of the points made by counsel, in their discussion of this alleged error, that we should give a summary at least of the facts alleged in the fourth paragraph of the complaint. In said paragraph,

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after alleging the execution of the policy in suit substantially as stated in the second paragraph of her complaint, the appellee further said that the consideration for said policy was the payment by her annually, so long as the said William Hinesley should live, of the sum of \$29.52, as follows: For the first four years, she was to pay one-half of said sum in money, the other half by a note payable at the death of said William Hinesley, unless sooner cancelled by dividend, with interest at the rate of six per cent. per annum; that after five years the appellant was to apply the annual dividend, which, the appellant said, would be equal to or greater than the note given in each previous year, to the payment of the interest on the outstanding notes at the rate of six per cent. per annum, and in reduction of the said sum of \$29.52, and the appellee was to pay the balance of said sum in money; that the appellee complied with all said conditions as to payment, until and including the payment due February 6th, 1874; that thereafter, and before the next annual premium became due, the appellant wrongfully and in violation of the agreement and contract as to the manner of payment of the said sum, and as to the rate of interest payable on the outstanding notes, demanded from appellee that she should pay the interest on the outstanding notes at the rate of seven per cent., and notified her that the rate of interest which said notes bore, to wit, six per cent., would not be received if tendered, and further notified her that no other or succeeding premiums would be received on said policy unless the rate of seven per cent. was paid on said notes; that the appellee was ready and willing to pay the premiums on said policy according to the manner aforesaid, and to pay the lawful rate of interest on said notes, and, after credit of the dividends due her, on the lawful rate of interest on said notes and then on the premiums, was ready and willing to pay the balance of said premiums found to be due, as the appellant well knew; that appellee refused to pay said rate

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of seven per cent. interest on said notes, as she lawfully might, and thereafter, after her refusal and after the date when the premium for that year was due, the appellant declared said policy void and of no effect, and cancelled the same on its books ; that said demand for seven per cent. interest on said outstanding notes, and said notice that no other or succeeding premiums would be received on said policy, unless appellee would pay said rate of seven per cent., was wrongful, unlawful and oppressive, and in violation of the contract and agreement between her and the appellant, as to the payment of said premium, and excused payment or tender of payment of interest on said outstanding notes, and excused payment or tender of payment of premiums on said policy then or thereafter, and said policy continued to be in full force and effect ; and that said William Hinesley died on the 24th day of June, 1876, and due notice and proof of his death were given the appellant on March 9th, 1877, and the appellant refused to pay said sum of \$1,200.00. Wherefore, etc.

It is said by the appellant's counsel, in their brief of this cause, that "this paragraph of complaint predicates itself upon the alleged wrongful demand of interest at seven per cent., when six only was payable. There were four notes of \$14.76 each, amounting in all to \$59.04." If, as alleged, the appellant wrongfully, and in violation of its agreement with the appellee, demanded of her that she should pay the interest on the outstanding notes at the rate of seven per cent., when six per cent. only was payable thereon, and notified her that six per cent. interest would not be received, if tendered, and that no other or succeeding premiums would be received on said policy, unless the rate of seven per cent. was paid on said notes, it is very clear, we think, that the appellee was thereby and thereafter excused from the performance of her part of her agreement with the appellant. Thus, it was held by this court, in *Turner v. Parry*, 27

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Ind. 163, that "When a party to an agreement gives notice to the other of his determination not to perform the contract on his part, performance by the party receiving such notice is unnecessary." In *Shaw v. The Republic Life Ins. Co.*, 69 N. Y. 286, the Court of Appeals of New York say: "Where one party to a contract declares to the other party to it, that he will not make the performance on the future day fixed by it therefor, and does not, before the time arrives for an act to be done by the other party, withdraw his declaration, the other party is excused from performance on his part, or offer to perform, and may maintain his action for a breach of the contract when the day has passed." *Hayner v. The American Popular Life Ins. Co.*, 69 N. Y. 435. In our opinion, the facts stated in the fourth paragraph of complaint were sufficient to constitute a cause of action.

The appellant's counsel claim that there was a fatal variance between the allegations of the fourth paragraph of complaint and the evidence given on the trial, in this: In stating the consideration of the policy, it was said by the appellee, that, for the first four years, she was to pay one-half of the annual premium by a note payable at the death of said William Hinesley; but the notes in question, when given in evidence, showed upon their face that they were payable, respectively, two in thirty days and two in twelve months, after the date thereof. Three of the notes were payable "with interest payable annually in advance at six per cent.," and the other note was entirely silent on the subject of interest; and in each of the notes it was stipulated that the "policy and all payments or profits, which may become due thereon, are hereby pledged and hypothesized to said company for the payment of this note." It seems to us that it is manifest from the terms of these notes, that beyond the interest thereon, which was payable annually in advance, it was not contemplated by either of the parties thereto that the notes should ever be paid until the policy

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should become a claim against the appellant, upon the death of William Hinesley, unless sooner paid by profits. For this reason, it might well be said, we think, that even if the mere statement of the manner in which the premiums were payable for the first four years, namely, one-half cash and the other half payable by a note at the death of William Hinesley, could be properly regarded as a positive allegation that the outstanding notes were in fact so payable, the variance between this allegation and the notes in evidence could not well be considered as substantial or material, and certainly not as fatal. For such a variance could not possibly affect the substance of the matters in issue, to the appellant's prejudice. Besides, the variance was one which might have been obviated by an amendment on the trial, and this court will regard the amendment as having been made.

It has seemed to us, that while the evidence was not of the most satisfactory character, yet its tendency was to sustain the material allegations of the fourth paragraph of the complaint. We can not say, therefore, that the trial court erred in refusing to give the jury the eighth instruction asked by the appellant. It was long since settled in this court, that the verdict of a jury would not be disturbed upon the weight or preponderance of the evidence.

It is insisted also that the appellant's motion for a judgment in its favor, on the special findings of the jury, notwithstanding their general verdict, was improperly overruled. We are of the opinion, however, that this ruling of the trial court was not erroneous. It is true that the special findings of the jury were incongruous, and that some of the facts specially found were not in harmony with other special findings; but this inconsistency related to the evidentiary facts, and not to the substantial facts in issue. We have found no such inconsistency between the special findings of the jury and their general verdict as entitled the appellant to a judgment in its favor on the former, notwithstanding the latter;

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and, therefore, we think that the appellant's motion for judgment was correctly overruled.

Our conclusion is, that there is no error in the record of this cause, for which the judgment below ought to be reversed.

The judgment is affirmed, at the appellant's costs.

No. 9111.

THE STATE v. SHERWOOD ET AL.

CRIMINAL LAW.—Abortion.—Indictment.—Statute Construed.—An indictment averring that the defendant unlawfully and wilfully employed and used in and upon the body and womb of a pregnant woman a certain instrument called a catheter, with intent to produce a miscarriage, it not being necessary to cause said miscarriage, to preserve the life of the woman, sufficiently charges an offence, within the meaning of section 36 of the misdemeanor act, 2 R. S. 1876, p. 471.

From the Orange Circuit Court.

D. P. Baldwin, Attorney General, and **M. S. Mavity**, Prosecuting Attorney, for the State.

NIBLACK, J.—The grand jury of Orange county, at the October term, 1879, of the Orange Circuit Court, returned into court an indictment charging "that at said county of Orange, in the State of Indiana, on the 29th day of August, 1878, William F. Sherwood, Jr., and Arcus Lindley did then and there unlawfully and wilfully employ and use in and upon the body and womb of one Emma King, who was then and there a pregnant woman, as the said William F. Sherwood, Jr., and Arcus Lindley well knew, a certain instrument called a catheter, with intent then and there and thereby to procure and produce the miscarriage of the said Emma

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King, it not being then 'and there necessary to cause said miscarriage, to preserve the life of the said Emma King.'"

Upon the motion of the defendants, the indictment was quashed, and they were discharged.

The State has appealed and assigned error upon the decision of the court quashing the indictment.

The indictment in this case was founded upon section 36 of the misdemeanor act, 2 R. S. 1876, p. 471, and so much of that section as is applicable to the offence intended to be charged reads as follows: "Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, anything whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, * * * shall be punished by imprisonment in the county jail, not exceeding twelve months, and be fined not exceeding five hundred dollars."

We have no brief from the appellees, and consequently nothing from them indicating any objection to the indictment, or in support of the decision of the court below.

The introductory and concluding portions of the indictment were formally sufficient, and we are unable to see any substantial, or even technical, ground of objection to that portion of it set out as above. Its averments fairly charged an offence within the meaning of the statute. Moore's Crim. Law, sec. 593.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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No. 7727.

SOHN v. WOOD ET AL.

REAL ESTATE.—Action to Quiet Title.—Sale for Taxes.—Adjudication.—

Answer.—In an action to quiet title to real estate, an answer, in substance, alleging that the plaintiff's title was by purchase at a tax sale in 1870, for taxes of 1868 and 1869, that no deed was executed to him until 1878, that, in an action instituted by him in 1876, against the then owners of the land, judgment was rendered annulling and setting aside the sale to him and declaring the taxes a lien thereon, and ordering its sale to pay them, that afterward so much of said judgment as declared the taxes a lien was set aside and vacated, and the title was adjudged to be in said owners, and that the defendants answering are the owners by grant from them, shows that the rights of the parties were finally settled and determined by the judgments pleaded, and contains a good defence, on demurrer.

SAME.—Tax Title.—Lien for Taxes.—Statute Construed.—Section 257 of the tax law of December 21st, 1872, 1 R. S. 1876, p. 129, does not apply to cases where there has been an adjudication, but declares a rule by which courts are to measure the rights of the parties when the cause comes up for judgment.

SAME.—Evidence.—Sale and Purchase.—Voluntary Payment.—Where one claims to hold a lien for taxes paid upon the lands of another, he must show that the lands were sold for taxes, and were purchased by him at such sale. Mere voluntary payment is not enough to entitle him to a lien.

From the Grant Circuit Court.

J. Brownlee, G. W. Harvey and — Kersey, for appellant.

A. Steele and R. T. St. John, for appellees.

ELLIOTT, J.—Appellant instituted this action to quiet title to certain real estate, of which he claimed to be the owner, under a tax deed executed to him by the auditor of Grant county. The appellees answered in two paragraphs. A demurrer was overruled to the second paragraph, and upon this ruling is based one of the assignments of error.

The second paragraph of the answer contains, in substance, these allegations: That appellant purchased the land at a tax sale made on the 10th day of February, 1870; that the

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taxes for which the lands were so sold were the taxes of 1868 and 1869 ; that no deed was executed or demanded until the 23d day of April, 1878, when a deed was executed ; that before the demand for and execution of the deed, to wit, at the September term, 1876, of the Grant Circuit Court, the appellant instituted an action against George C. Rowland and others, then the owners of the land, to set aside the tax sale, and that the said sale was annulled and set aside ; that it was adjudged in said action that the taxes were a lien on said land, and the sale thereof was ordered to pay said lien ; that at the February term, 1878, a proceeding was prosecuted by said Rowland and others to set aside so much of the former judgment as declared the taxes to be a lien on the land ; that the court did set aside and vacate the judgment declaring the taxes to be a lien, and adjudged the title to be in the said Rowland and others. It is also averred that appellees are the owners by grant from the said Rowland and others.

The argument of the appellant is, "That the effect of the review of the first decree was to place appellant in the same position in which he stood with his certificate of sale before he had the same annulled, and the land decreed liable therefor," and that under section 257 of the tax law his remedy revived. This argument is plainly fallacious. The questions of the validity of the tax deed, and of the right to a lien, were both litigated. In the first action the tax deed was declared void, and a lien declared ; in the second that part of the decree declaring a lien was set aside, and the result of both proceedings is a direct adjudication that appellant had neither title nor lien.

Section 257 of the tax law, to which appellant refers, yields his argument no support. That section does not apply to cases where there has been an adjudication, but declares a rule by which courts are to measure the rights of the parties when the cause comes up for judgment. In the case

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at bar the rights of the parties, under the rules of law prescribed by the statute referred to, as well as by all other statutes, were finally settled and determined by the judgments described in the answer.

The motion for a new trial was rightly overruled. There is no evidence showing that the taxes were ever assessed against the land described in the complaint, nor is it shown that the land was sold for taxes. Neither the tax deed nor any instrument or record, executed or kept by any public officer, was introduced in evidence. Indeed, there is nothing to show that the taxes were not voluntarily paid. On the margin of the record counsel have made a note referring to the tax deed, but it is not incorporated in the bill of exceptions.

It is not enough to merely prove payment of taxes, to entitle a person paying taxes on the lands of another to have a lien established for taxes so paid. More than the mere payment of taxes must be shown. There can not be a lien unless there has been a sale. We do not mean to decide that a lien invariably attaches after sale; for that question is not here involved. But we do decide that where one claims to hold a lien for taxes paid upon the lands of another he must show that the lands were sold for taxes and were purchased by him at such sale.

The effect of the evidence introduced by the appellees we need not consider. It may be true, as counsel urge, that the appellees failed to properly connect themselves with the judgments pleaded in the second paragraph of the answer. Be this as it may, it is very certain that the appellant entirely failed to make out a case.

Judgment affirmed.

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No. 9524.

STODDARD ET AL. V. JOHNSON, TREASURER, ET AL.

PLEADING.—*Practice.*—*Argumentative Denial.*—*Demurrer.*—An argumentative denial, deduced from facts well pleaded, is equivalent to a special denial of the inconsistent averments of the complaint, and may be good on demurrer.

ESTOPPEL IN PAIS.—As a rule, there can be no estoppel by conduct, short of a binding contract, where the facts out of which the estoppel is claimed to arise are known to all the parties.

GRAVEL ROAD.—*Assessments.*—*Injunction.*—*Statute Construed.*—Section 12 of the act of March 3d, 1877, in relation to the construction of gravel roads, Acts 1877, Reg. Sess., p. 82, confers authority upon the circuit court to enjoin or declare void an assessment ordered by the county commissioners, only in actions brought by a single individual or by individuals having a single interest, for the purpose of enjoining or declaring void the assessment made against his or their land, and wherein a judgment could be rendered without affecting the rights or liabilities of other parties in interest, and does not apply to an action by numerous parties, in which it is sought to enjoin the collection of assessments made upon their lands for the construction of a gravel road.

SAME.—*Error in Proceedings.*—*Intention of Legislature.*—Under the provisions of said section, it was intended by the Legislature that errors and defects in the proceedings, which did not directly and injuriously affect the rights of the complainant, should not be deemed cause for assailing such proceedings.

JURISDICTION.—*Judgments of Inferior Courts.*—*Presumptions.*—*Collateral Attack.*—When the jurisdiction of an inferior tribunal is once established over the subject-matter of, and the parties to, a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevail in favor of the action of courts of general powers, and its judgments are unassailable by collateral attack.

SAME.—Where an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its determination is conclusive as against collateral attack.

FREE GRAVEL ROAD.—*Construction of.*—*County Commissioners.*—*Finding of Jurisdictional Facts.*—*Presumptions.*—*Record.*—*Judgment.*—*Collateral Attack.*—The filing or presentation of a petition to the board of county commissioners for the construction of a free gravel road, under the act of March 3d, 1877, *supra*, calls into exercise the jurisdiction of such board, and authorizes it to determine, not only whether the petition is properly signed by the requisite number of land-owners, but every other fact necessary to the granting of the prayer of the petition, whether the proposed improvement, its kind, and the points between which it was to be made, and the like, were sufficiently stated; and it is not necessary

75	20
128	76
129	518
75	20
130	222
130	412
75	20
133	93
75	20
135	374
75	20
138	624
75	20
142	591
143	515
75	20
146	113
147	503
75	20
148	471
152	489
152	576
75	20
153	246
75	20
155	488
155	495
156	167
75	20
157	162
75	20
167	57
75	20
169	375

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that the record of the board shall show an express finding upon such facts, as such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed; and herein, the order for the appointment of the viewers and engineer, and fixing the time and place of their meeting, is equivalent to a finding of the facts necessary to be found, and to an adjudication of the board, that the petition itself is sufficient, which adjudication can not be collaterally attacked.

SAME.—*Petition May Include Line of Road with Branches.*—The act of 1877, *supra*, does not authorize the including of more than one improvement in a single petition, but does not forbid a petition for an improvement, whether it be a single continuous line, or a line with branches, so long as all the parts are connected.

SAME.—*Description of Improvement.—Specifications.*—Where, under said act, the petition states that it is for a gravel road, that is a sufficient description of the kind of improvement prayed for, no other specification being required until the board of commissioners comes to order the improvement made.

SAME.—*Statute Construed.—When Jurisdiction of County Commissioners Not Lost.*—The viewers and engineer appointed by a board of commissioners, upon a petition for the construction of a free gravel road, under the act of March 3d, 1877, *supra*, made report at the next regular session after their appointment, but the schedule of lands reported benefited was not spread of record therewith, and, the record reciting that the petition was not then signed by the requisite number of landholders, the matter was continued. No record of any steps taken in relation thereto at the next regular session was shown, but, at a special session following, the viewers and engineer again made report, which, with the schedule of lands benefited, was spread of record, no one objecting; and, upon proof being made that the petition had been signed by the requisite number of landholders, the board ordered the work.

Held, that the provisions of section 12 of said act were sufficient to prevent a loss of the jurisdiction of the board of commissioners by its failure to act upon the report or enter a continuance thereof at its regular session.

From the Montgomery Circuit Court.

G. W. Paul and J. E. Humphries, for appellants.

G. D. Hurley, B. Crane, P. S. Kennedy and W. T. Brush, for appellees.

Woods, J.—Action by the appellants against the appellees, as the treasurer, auditor and board of commissioners of

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Montgomery county, to enjoin the collection of certain assessments made upon lands of the appellants for the construction of a free gravel road under the act of March 3d, 1877. Acts 1877, Reg. Sess., p. 82.

The court having overruled their demurrer to the answer, the appellants chose to abide by their exception to the ruling, and refused to reply. Judgment was given accordingly for the defendants. The complaint and answer are of great length, and loaded down with exhibits needlessly repeated, consisting of alleged copies of the record of the proceedings of the board of commissioners, reports of viewers, and other papers, copied at full length into the pleadings. Numerous defects and irregularities are alleged in the complaint, for which it is claimed that the procedure which resulted in the alleged assessments, and the assessments themselves, must be held void. The answer sets out the record and papers of the proceedings had before the board with greater fulness than the complaint, and shows argumentatively that many, and perhaps the more serious, defects alleged in the complaint do not exist. For instance, the complaint charges that certain important steps in the proceedings were had at special sessions of the board of county commissioners, which sessions were illegal because not convened in any of the modes prescribed by law, and that the bond, and the publications of notice, required by the second, fifth and sixth sections of the law, were not made. The answer, however, shows that these requirements of the statute were complied with. The demurrer admits the truth of the answer, and, notwithstanding the facts stated might have been proved under a general denial if one had been pleaded, the answer is good, if, admitting its truth, there does not remain undenied or uncontradicted enough of the complaint to constitute a cause of action. An argumentative denial, deduced from facts well pleaded, is equivalent to a special denial of the inconsistent averments of the complaint, and will be good

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on demurrer, if it goes far enough. *Judah v. The Trustees of Vincennes University*, 23 Ind. 272; *Loeb v. Weis*, 64 Ind. 285; *Burns v. Stanley*, 72 Ind. 350.

The answer also contains averments on which it is claimed that the appellants are estopped from contesting the assessments, namely, that they stood by, and without objection permitted the work to progress to completion, knowing that it was being done, and paid for with moneys borrowed by the county, under the law, for the purpose of being so expended. But, as a rule, there can be no estoppel by conduct, short of a binding contract, where the facts out of which the estoppel is claimed to arise are known to all the parties, as in this and like cases they necessarily were known. *Reid v. The State, ex rel.*, 74 Ind. 252. The sufficiency of the plea depends, therefore, on its other averments.

The bringing of this action was a collateral attack upon the proceedings and order of the board, and the case must be determined according to the rules applicable to such attack. If the board obtained jurisdiction over the subject-matter of the procedure and over the persons of the appellants, and in no manner lost or exceeded its jurisdiction, it is clear on general principles, aside from the provision contained in the 12th section of the act under which the proceedings were had, that errors and irregularities, whether manifest in the record or shown only in the complaint, can furnish no ground for an injunction. The authorities to this effect are numerous. References to some of them will be made as we proceed.

We give so much of the act governing the subject as is deemed pertinent to the decision of the questions presented:

"Sec. 1. * The board of commissioners of any county in this State shall have power, as hereinafter provided, to lay out, construct or improve, by straightening, grading, or draining in any direction required to reach the most convenient and sufficient outlet, paving, gravelling, or macadamizing any state or county road, or any part of such road, within the limits of their respective counties.

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"Sec. 2. Upon the presentation of a petition stating the kind of improvement prayed for, and the points between which the same is asked, signed by five or more of the land-holders whose lands will be assessed for the cost of the improvement, and the filing of a bond, signed by one or more responsible freeholders, * * * the board of commissioners shall appoint three disinterested freeholders of the county as viewers, and a competent surveyor or engineer to proceed upon a day to be named by the commissioners to examine, view, lay out or straighten said road, as in their opinion public convenience and utility require ; and the county auditor shall notify said viewers and surveyor of the time and place of their meeting to make said view, and shall also give notice, by publication in a newspaper printed in said county for three consecutive weeks, next prior to said meeting, which notice shall state the time and place of said meeting, the kind of improvement asked for, the place of beginning, intermediate points (if any), and the place of termination.

"Sec. 4. The viewers, and surveyor or engineer shall make a report to the commissioners at their next regular session, showing the public necessity of the contemplated construction or improvement, the damages claimed, and by whom, and the amount assessed to each claimant, and an estimate of the expenses of said improvement, and the lots and lands which will be benefited thereby, and ought to be assessed for the expenses of the same : *Provided*, That no lands shall be so assessed, which do not lie within two miles of the contemplated improvement : *Provided further*, That lands having once been assessed for the expense of any improvement, made under the provisions of this act, shall not be re-assessed, unless the prior assessment shall not be deemed proportioned to the whole benefit resulting to said land : *Provided*, That where lands are liable to be assessed, under this act, for the construction of two or more roads, the viewers shall take into consideration that fact in assessing benefits.

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“Sec. 5. Upon the return of the report mentioned in the last section, the commissioners shall, if in their opinion public utility requires it, enter upon the record an order that the improvement be made, which order shall state the kind of improvement to be made, and the width and extent of the same, and the lands which shall be assessed for the expense of the same; but such order shall not be made until a majority of the resident landholders of the county whose lands are reported as benefited and ought to be assessed, and also the owners of a majority of the whole number of acres of all lands that are reported as benefited and ought to be assessed, shall have subscribed the petition mentioned in the second section of this act. * * * If at any time after making such final order the commissioners shall find that there has been an omission of lots or lands within the territory sought to be assessed, or that there has been manifest injustice in the apportionment of taxes, or that public necessity requires any alteration in the manner of the improvement as ordered, they are authorized to make such addition and re-apportionment as they may deem just and proper, and such change in the improvement as will conform the same to the public requirement. * * * *

“Sec. 6. The commissioners, when any such improvement shall be ordered, shall immediately appoint three disinterested freeholders of the county, who shall, upon actual view of the premises, apportion the estimated expense of said improvement upon the real property embraced in the order aforesaid, according to the benefit to be derived therefrom, and report the same to the county auditor. * * * When the report of said committee shall be returned, the county auditor shall give notice of it by publication in some newspaper published and of general circulation in said county, and shall also give notice, for at least three consecutive weeks, of the time when the commissioners will meet at the county auditor’s office to hear the same. On the day

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named in said notice, the commissioners shall meet, and if no exceptions have been filed to said report, they shall confirm the same; but if exceptions in writing have been filed by any of the owners of the land affected thereby, they shall first proceed to hear such exceptions, and for that purpose shall hear any testimony that shall be offered by any party interested. * * They may either confirm said report, or change the same, or refer the same to a new committee of three disinterested freeholders. * * * The final action of the commissioners shall be entered upon their records, together with the report as confirmed, showing how the said estimated expense has been apportioned upon the land ordered to be assessed as aforesaid. * * * The said assessment * shall be placed upon a special duplicate, * * * and shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes are.

“Sec. 12. No person shall be permitted to take advantage of any error committed in any proceeding to lay out, construct or improve any road under and by virtue of this act; nor of any error committed by the county commissioners, or by the county auditor, or by the engineer, or surveyor, or other person or persons in the proceedings to lay out, construct or improve any such road; nor of any informality, error or defect appearing in the record of such proceeding, unless the party complaining is affected thereby. But the circuit court, in which any action may be brought to enjoin, reverse or declare void the proceedings by which any such road has been laid out, constructed or improved, or ordered to be laid out, constructed or improved, or to enjoin the collection of any tax or assessment levied, or ordered to be levied, for the purpose aforesaid; or of either, may, if there be manifest error in such proceedings affecting the rights of the plaintiff in such action, set the same aside, as to him, without affecting the rights or liabilities of other parties in interest; and the court shall, in the final hearing, make such

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order in the premises as may seem equitable and just, and may order the tax assessment levied against the plaintiff to remain on the duplicate for collection, or to be again levied, in whole or in part, or may perpetually enjoin the same, or any part thereof. The costs of such action, and the proceedings had therein, shall be apportioned among the parties or paid out of the county treasury, in whole or in part, as justice may require and the court direct: *Provided*, That all the lands liable to assessment under the provisions of this act, for the construction of such road, shall be held responsible to the county, to protect the county against all loss or liability arising from any judicial proceeding affecting the assessments for benefits; and also costs and expenses that may arise in any litigation; and re-assessments may be made to discharge the same."

We do not find it necessary in this case to enter upon the probably difficult task of interpreting the provisions of the last section quoted. If its design and effect be to confer on the circuit court, in an action to enjoin or declare void an assessment ordered by the commissioners, the jurisdiction and powers which are commonly and more appropriately exercised on appeal, still it was contemplated that this should be done only in actions brought by a single individual, or by individuals having a single interest, for the purpose of enjoining or declaring void the assessment made against his or their own land, and wherein a judgment could be rendered, "without affecting the rights or liabilities of other parties in interest." We are at least clear that the section does not so far apply to this action, which was instituted by more than forty persons, for themselves "and other persons too numerous to be brought before the court," as to authorize the maintaining of the suit, for any other purpose than obtaining the injunction prayed for, and upon such grounds as would warrant that relief, without reference to the provisions of this section. That is to say: If the proceeding is

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shown to be absolutely void, the injunction prayed for will be granted ; but if nothing more than errors and irregularities, not affecting the jurisdiction of the commissioners, is shown, the injunction must be refused, without attempting any correction of such errors.

Coming then to the subject of jurisdiction, it is evident that the jurisdiction of the board of commissioners over the subject-matter of proceedings under this law begins with the presentation of the petition required by the second section. No notice of its presentation or of the hearing thereof is required. The first step toward acquiring jurisdiction over the persons of parties interested is the notice required to be given of the time and place of the meeting of the viewers and surveyor or engineer, etc., the object of this notice, as shown by the third section, being to enable parties to lay before the viewers their claims for damages, if any, on account of the proposed work. The next and only other notice to parties is that required in the sixth section, of the time when the commissioners will meet at the auditor's office to hear exceptions to the report of the apportionment or assessments of the cost of the improvement. As the answer shows affirmatively that the required notices were given, there can be no question of the jurisdiction in this respect. It is claimed, however, that no such petition was presented as conferred jurisdiction of the subject-matter in the first instance ; and, as much stress is laid upon this point, we give the petition, as in the answer it is alleged to have been, to wit :

"To the Board of Commissioners of Montgomery County, Indiana : We, whose names are hereinafter subscribed, do hereby represent that we are each freeholders, residents of said county and State, whose property will be affected by the improvement hereinafter petitioned for, viz. : To grade, culvert and gravel in a good and substantial manner the following described line of public highway : Beginning at the township line between the townships of Madison and Coal

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Creek, on the section line dividing sections 7 and 18 of Madison township, thence east on the same line between sections 8 and 17, and 9 and 16, and 10 and 15, and 11 and 14, and 12 and 13, to the township line between Madison and Sugar Creek townships, thence east on the section line between sections 7 and 18 of Sugar Creek township, one hundred and sixty rods, to the eastern terminus of the proposed line of improvement, and then beginning on the above described section line between section 8 and 17, at a point about 9 rods east from the southwest corner of section 8, thence north about 90 rods, extending through the town of Linden, thence west about 6 rods, thence north on the Lafayette road to the county line between the counties of Montgomery and Tippecanoe, to the north terminus of the proposed line of improvement, all of which is situated in Montgomery County, State of Indiana." Signed by eleven names.

It is claimed that this petition was void and insufficient to give the board of commissioners jurisdiction to act in the proceedings, because (1) it describes, and asks the improvement of, more than one road, while only one road can lawfully be included in one petition; (2) it does not contain any prayer, nor state the kind of improvement prayed for; (3) it does not show by township or range the beginning and terminus of either of the two lines of road to be improved. Besides these objections to the document itself, the further points are made that the record does not show "the presentation of the petition," by some one authorized to present it to the board; nor that five or any number of freeholders, whose lands would be affected, had signed the petition; nor that the board passed upon and found the necessary jurisdictional facts.

In support of these objections, counsel for the appellants insist that the law under which the proceedings were had must be construed strictly: that the commissioners' court being one of inferior and limited powers, its jurisdiction

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and proceedings must appear and be shown affirmatively by the record ; that other proof than the record is inadmissible, and that presumptions in favor of its proceedings can not be indulged.

It is fairly inferable from the twelfth section of this enactment, that the Legislature intended a liberal interpretation of its provisions, and that errors and defects which did not directly and injuriously affect the rights of the complainant should not be deemed cause for assailing the proceedings. But, aside from the provisions of this section, the rule of law now is, whatever confusion there may have been on the subject, that once the jurisdiction of an inferior tribunal is established over the subject-matter of and the parties to a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevail in favor of the action of the courts of general powers, and its judgments are alike unassailable by collateral attack. *The Evansville, etc., R. R. Co. v. The City of Evansville*, 15 Ind. 395 ; *Dequindre v. Williams*, 31 Ind. 444 ; *Hord v. Elliott*, 33 Ind. 220 ; *English v. Smock*, 34 Ind. 115 ; *Ney v. Swinney*, 36 Ind. 454 ; *The Pendleton, etc., T. P. Co. v. Barnard*, 40 Ind. 146 ; *Worthington v. Dunkin*, 41 Ind. 515 ; *Curry v. Miller*, 42 Ind. 320 ; *The Board of Comm'rs, etc., v. Markle*, 46 Ind. 96 ; *Evans v. The Clermont, etc., G. R. Co.*, 51 Ind. 160 ; *Markle v. The Board, etc.*, 55 Ind. 185 ; *The Board, etc., v. Hall*, 70 Ind. 469 ; *Miller v. Porter*, 71 Ind. 521 ; *Mullikin v. The City of Bloomington*, 72 Ind. 161 ; *Porter v. Stout*, 73 Ind. 3 ; *Houk v. Barthold*, 73 Ind. 21 ; *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499.

These authorities show further, that when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its determination thereon is conclusive as against collateral attack, and that, in such proceedings as that under consideration, the filing or presentation of the petition

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calls into exercise the jurisdiction of the board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite land-owners, but every other fact necessary to the granting of the prayer of the petition ; for instance, in this case, whether the proposed improvement, its kind, and the points between which it was to be made, and the like, were sufficiently stated And it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition or for the taking of the steps necessary to the accomplishment of the end designed. In this case the order for the appointment of the viewers and engineer, and fixing the time and place of their meeting, is equivalent to a finding of the facts necessary to have been found, and to an adjudication of the board, that the petition itself is sufficient. By the presentation of the petition, the judgment of the board upon its sufficiency was invoked, and their judgment in this respect, as much as in other respects, is exempt from collateral attack.

We are not, however, to be understood as meaning by this, that any petition, however defective or irrelevant, will be deemed sufficient to invoke the jurisdiction of the commissioners to decide upon its sufficiency, and to impart validity to that decision as against collateral attack. The circuit court could not, in an action upon a promissory note, give a valid judgment by default for the recovery of real estate. The petition must, of course, be relevant.

In support of their claim that the petition was defective, that the board did not acquire jurisdiction, and that the record of the board must show affirmatively that it acquired jurisdiction and conducted the proceedings in strict conformity with the requirements of the law, besides numerous cases from other states, counsel have cited the following cases : *State v. Conner*, 5 Blackf. 325 ; *Rhode v. Davis*, 2 Ind.

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53 ; *Straughan v. Inge*, 5 Ind. 157 ; *Rosenthal v. The Madison, etc.*, *Plank R. Co.*, 10 Ind. 358 ; *Cobb v. State*, 27 Ind. 133 ; *Palmer v. Stumph*, 29 Ind. 329 ; *State v. Gachenheimer*, 30 Ind. 63 ; *The Ohio, etc., R. R. Co. v. Shultz*, 31 Ind. 150 ; *English v. Smock*, 34 Ind. 115 ; *The Presbyterian Church, etc., v. City of Fort Wayne*, 36 Ind. 338 ; *Moberry. v. City of Jeffersonville*, 38 Ind. 198 ; *The Detroit, etc., R. R. Co. v. Bearss*, 39 Ind. 598 ; *Vogel v. The Lawrenceburgh, etc., Co.*, 49 Ind. 218 ; *Farmer v. Pauley*, 50 Ind. 583 ; *Shute v. Decker*, 51 Ind. 241 ; *McDonald v. Wilson*, 59 Ind. 54 ; *Columbus, etc., R. W. Co. v. The Board, etc.*, 65 Ind. 427 ; *Deisner v. Simpson*, 72 Ind. 435 ; *Doctor v. Hartman*, 74 Ind. 221 ; *Boys v. Simmons*, 72 Ind. 593.

In most of these cases, the questions were raised on appeal, and involved no collateral attack. In so far as many of these cases hold that the jurisdiction of an inferior court must be shown in its own record, they accord with our present ruling and with the cases cited *supra*. Some of them perhaps contain *dicta* against the indulgence of presumptions in favor of the proceedings of inferior courts, after jurisdiction has been acquired, and to the effect that their proceedings are void unless in strict compliance with the law. If so, they are not in harmony with the cases cited, and in such respects are overruled.

We agree with counsel for the appellant, that the statute does not authorize the including of more than one improvement in a single petition, but if counsel mean, as they seem to, that only one highway, or parts of only one, may be included in a single improvement, we do not assent. If that construction of the law be adopted, then a gravel road, in a single proceeding, can not be constructed through a town or city except along a single street, for every street is a separate highway ; and in the country each enterprise must end with the highway on which it is begun, though connecting

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with another highway leading in the direction of the desired improvement. The petition must state the points between which the improvement is asked; and we find in the law nothing which forbids a petition for an improvement, whether it be a single continuous line, or a line with branches, so long as all the parts are connected. It may be urged, as counsel have suggested, that all the roads of a county are connected, and so might all be brought into one scheme; but not unless a majority of the resident landholders should first sign the petition. There is little danger of an abuse of the law in that direction. Neighborhoods will seek such improvements when they need, and think themselves able to pay for, them. And if the neighborhood will be better accommodated by a road in the shape of a cross, circle or other figure of connected parts, than by a continuous straight line, the law does does not forbid it.

The petition is for a gravel road, and that is a sufficient description of the kind of improvement prayed for. No further specification is required until the board comes to order the improvement made. That order must "state the kind of improvement to be made, and the width and extent of the same." But this is not necessarily final, and may be so changed by the board as to conform "to the public requirement." We may suggest, without deciding, that the law contemplates that the viewers shall in the first instance determine the width, depth, and the like specifications in regard to the construction of the work, and make report thereof to the board. By the terms of the law, the viewers are to "examine, lay out, or straighten, as in their opinion public utility and convenience require." The petition was clearly sufficient to invoke the consideration of the board, and to confer upon it jurisdiction to proceed.

It is also alleged in the complaint that the petition was not finally, and before the making of the order for the con-

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struction of the work, signed by a majority of the resident land-owners, as required in the fifth section of the law. This, as counsel claim, is a jurisdictional requirement, without compliance with which the board had no power to proceed further. The board, however, did proceed, and if there were not, as there is, an express finding that the necessary number of such land-owners had signed, the question could not be raised in this collateral way.

The report of the viewers and engineer was made to the board at the next regular session in December, 1878, but the schedule of lands reported benefited was not spread on the record, with the report proper. The record was made to recite that the petition was not then signed by a sufficient number, and the matter was continued. No record of any step at the regular session in March, 1879, is shown, but at a special session in April, 1879, the viewers and engineer again presented their report, which, with the schedule, was spread of record, and no one objecting, and it being shown by proof that the requisite number of landholders had signed, the board ordered the work, and appointed a committee of viewers to apportion the cost thereof. It is now insisted that the court lost its jurisdiction by doing nothing, and entering no formal continuance of the matter, at the March term, 1879, and, in support of the position, counsel cite *Inhabitants, etc., v. Commissioners*, 59 Me. 391, cited in *Doctor v. Hartman, supra*; *State v. Castle*, 44 Wis. 670; *Gamage v. Law*, 2 Johns. 192; *Clark v. Holmes*, 1 Doug. Mich. 390; *Brady v. Taber*, 29 Mich. 199; *Dunlap v. Robinson*, 12 Ohio St. 530; Wells Jurisdiction, sec. 417; Abbott's Law Dict., tit. Discontinuance.

Deciding nothing upon the merits of the proposition in general, we hold that it is not applicable to a proceeding under this law, the 12th section of which is sufficient to prevent a lapse of jurisdiction for such cause.

The complaint charges numerous errors and defects in the

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reports of the original viewers, and of the committee of apportionment; as, for instance, that benefited lands had been omitted, and other tracts so defectively described as that the assessments made thereon were void. It is evident, however, that these and the like objections do not affect the jurisdiction, and, if true, constitute errors and irregularities which the law expressly authorizes the board to correct at any time. We do not think a more minute or particular statement of the numerous objections made would be justifiable or useful. They are all within the principles stated. We find no error in the record

Judgment affirmed, with costs.

NO. 5509.

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DUTCH ET AL. v. ANDERSON ET AL.

PRACTICE.—Motion for New Trial.—Rulings Assigned as Causes.—Exceptions.—A motion for a new trial "because of error of law" is too general in its terms. The particular rulings to which exceptions were taken, and because of which a new trial is asked, must be specified in the motion.

SAME.—Construction of Contract.—Province of Court.—It is the province of the court to construe a contract given in evidence, and, if asked, to instruct the jury accordingly.

MORTGAGE.—Payment in Sawing Logs.—Log Measure or Board Measure.—Satisfaction.—Evidence.—Contract Construed.—Reversal and New Trial Granted.—Where a mortgagor agreed, in writing, to pay the mortgage debt in sawing lumber, at specified rates per one hundred feet for walnut and oak and other logs, and, upon trial of an issue as to its satisfaction, wherein the principal matter of controversy was whether the contract provided for log measure or board measure, and the jury, construing the contract as providing for log measure, found the mortgage to be satisfied. On appeal,

Held, that the Supreme Court, in the absence of any evidence of construction by the lower court, construes the obligation to mean that the price stipulated was for lumber sawed and prepared for the market, and that

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the verdict of the jury was not sustained by sufficient evidence, they having adopted a false basis in their estimate of the amount paid on the mortgage.

SAME.—The terms of such obligation, in the absence of evidence that any deception was practiced upon the mortgagor, or that he did not or could not read it, or that it was not drawn in strict conformity with the understanding and purpose of the parties, are conclusive.

From the Boone Circuit Court.

G. H. Chapman, U. J. Hammond, F. Heiner and P. H. Dutch, for appellants.

J. S. Scobey, for appellees.

NEWCOMB, C.—The appellants were mortgagees of a saw-mill, and Anderson, one of the appellees, was a purchaser of the same mill, at a sheriff's sale, on an execution against the property of Matthews, the mortgagor, issued subsequent to the mortgage to the appellants. The mortgage was dated October 16th, 1873, and was duly recorded. On May 12th, 1875, the appellants commenced an action to recover possession of the mortgaged property, making Anderson, Matthews and the other appellees defendants thereto. The defendants severally answered by a denial of the complaint. A jury trial was had, which resulted in a finding for the defendants, that they were entitled to the possession of the property in controversy, and that it was of the value of \$1,000.

This was followed by a judgment for a return of the property, and in case of the failure of the plaintiffs to deliver the same, then that the defendants should recover from the plaintiffs one thousand dollars.

The plaintiffs moved for a new trial, for the following alleged causes :

1. That the verdict was contrary to law.
2. That the verdict was not sustained by sufficient evidence.
3. That the verdict was contrary to law and the evidence.
4. "Because of error of law."

The motion was overruled, and the plaintiffs excepted.

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During the progress of the trial, the plaintiffs reserved exceptions to divers rulings of the court in excluding evidence offered by them, and in admitting evidence offered by the defendants over their objections, but the questions intended to be saved by such exceptions can not be considered by us for the reason that the supposed errors of the court were not assigned as causes for a new trial. A motion for a new trial "because of error of law" is too general in its terms. The particular rulings of the court to which exceptions were taken, and because of which a new trial is asked, must be specified in the motion. Buskirk's Practice, 244; *Schofield v. Jennings*, 68 Ind. 232; *Weireter v. The State*, 69 Ind. 269; *Hyatt v. Cochran*, 69 Ind. 436.

The only question for us to consider is the sufficiency of the evidence to sustain the verdict.

The mortgage was conditioned to secure the payment of two notes of \$337.50 each, one of which had been paid in full, and \$100 credited on the other, before the commencement of the action; and also to secure the performance of the following obligation of Matthews, the mortgagor: "This indenture certifies that I, the undersigned, William B. Matthews, do hereby promise Kramer and Dutch that I will pay them the sum of fifteen hundred dollars in sawing, at the following rates per hundred feet for sawing, to wit: For sawing walnut lumber, and hearting and edging the same, the hearting and edging to be done on edging table now in the mill, this day bought of Kramer and Dutch, and for which this sawing is to be part payment, the sum of sixty cents per hundred feet; for sawing oak, fifty cents per hundred feet; and all other kinds of logs the same price. The said Kramer and Dutch shall be entitled to such of the edging strips as they may need for sticking lumber, provided they allow for them what they would make thrown into board measure; that is, what the sawing of them would come to at the same rates per hundred feet as other sawing;

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and the said Matthews agrees to do said fifteen hundred dollars worth of sawing at the prices herein stated, as fast as the said Kramer and Dutch shall deliver their logs upon the logway of said mill, or as close as the same can be delivered thereto, and to saw said lumber in a workmanlike manner; to use due diligence to prevent any damage or waste to the lumber or logs of the said Kramer and Dutch, and not to use any thicker saw in the sawing of said lumber than the saws recently used by Kramer and Dutch, and to saw as much of their lumber with the thinnest saw the size of the logs will admit of. Also to deliver the lumber in good order, outside mill, along the trackway on which lumber is delivered from said mill, and to saw said lumber in such sizes as from time to time Kramer and Dutch shall direct. All of said sawing to be done in one year from this 16th day of October, 1873.

W. B. MATTHEWS."

The principal matter of controversy at the trial appears to have been whether Matthews should be allowed for sawing by log measure or board measure. If the lumber was to be measured in the log, then the mortgage, according to the special findings of the jury, had been fully paid. If, however, the price stipulated was for board measure, or the measure of the lumber itself, after being sawed, edged and hearted, then a considerable sum was still due on the contract and mortgage, and the verdict was wrong.

It was the province of the court to construe the contract, but if it was asked to, or did, instruct the jury on that point, the record does not disclose the fact.

From the answers of the jury to certain interrogatories submitted by the defendants, it is apparent that they construed the contract as providing for log measure, and so found the mortgage to be satisfied.

The interrogatories and answers referred to are as follows:

"1. At log measure, how much sawing did Matthews do for the plaintiffs at 60 cents per 100, and how much at 50

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cents per 100? Ans. Number of feet, 282,201, at 60 cents; number of other feet, 38,983, at 50 cents.

“3. What amount do you find paid by Matthews, in sawing, under the contract? Ans. \$1,888.11.

“4. What amount has been paid in money or property, other than in sawing? Ans. \$100, credit on note. No evidence how paid.”

A calculation of the amount of sawing, by log measure, at the prices stated, in answer to interrogatory No. 1, gives the amount of payment in sawing, found in answer to No. 3.

The testimony of the mortgagor, Matthews, was, that the lumber sawed for the plaintiffs would measure one-fourth less than the measurement of the logs, and other witnesses placed the difference between log and board measure at from one-fifth to one-sixth. We think that the written contract will bear but one reasonable construction, which is, that the price stipulated was to be for lumber sawed and prepared for market. It provided that for sawing, edging and hearting walnut lumber, Matthews should be allowed sixty cents per hundred feet. When, under this clause, was the lumber to be measured? Evidently, after it had been sawed, edged and hearted, for, until that was done, it was not lumber such as the contract called for. A succeeding clause makes the meaning still plainer: By this it was agreed that Kramer and Dutch should be entitled to such of the edging strips as they might need for sticking lumber, provided they allowed for them what they would make thrown into board measure; “that is, what the sawing of them would come to at the same rates per hundred feet as other sawing.” According to the theory on which this case was decided, the plaintiffs were to pay twice for sawing such strips as they might use; once in log measure, before sawing, and again in board measure, after sawing. This clause of the contract, on the contrary, as we construe it, provides for board measure for the *lumber* sawed, and the like meas-

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ure for strips that did not come under the designation of lumber.

The contract further obligated Matthews to use due diligence to prevent any damage or waste to the lumber or logs of Kramer and Dutch. Again, the contract provided that Matthews should "deliver the *lumber* in good order, outside mill, along the trackway on which lumber is delivered from said mill, and to saw said lumber in such sizes as from time to time Kramer and Dutch shall direct."

By the term *lumber*, as used in these several clauses of the contract, we are clearly of the opinion that the parties meant the manufactured product of the logs, and we see nothing to justify an inference that it was used in any other sense.

It follows that the jury adopted a false basis in their estimate of the amount paid on the mortgage, and that the circuit court erred in overruling the motion for a new trial.

One witness for the defendants testified, over the objection of the plaintiffs, that, before the \$1,500 contract was signed by Matthews, it was read over by the plaintiff Dutch, and that, as he then read it, the price for the sawing was to be log measure, by Scribner's Log Book. In rebuttal, Dutch denied that he so read the contract. If this testimony was proper to be considered by the jury, in giving a construction to the contract, their finding would be conclusive on that point; but we think it irrelevant, and entitled to no consideration. Matthews did not testify that any deception was practiced on him by misreading or otherwise, nor did it appear by his testimony, nor that of any other witness, that he did not or could not read the contract, nor that it was not drawn in strict conformity with the understanding and purpose of the parties.

The judgment of the circuit court ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things, reversed, at the costs of the appellees; and that said

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cause be remanded with instructions to the Boone Circuit Court to sustain the motion of the appellants for a new trial.

No. 7949.

BONEWITS v. WYGANT.

REAL ESTATE.—Action to Recover.—Practice.—*Venire de Novo.*—Verdict.—

***Disclaimer.* — *Remittitur.* —** Where, in an action for the possession of an island, one of the two defendants entered a disclaimer before trial, and the verdict was that both defendants "are the owners in fee simple of the land described in plaintiff's complaint," and they entered a remittitur as to the lands, except that part described in their cross complaint seeking to quiet their title, no such uncertainty appears in the verdict as required a *venire de novo*.

SAME.—Surveyor's Record and Testimony.— On trial of such action, it was not error to permit the introduction in evidence of the county surveyor's record containing his survey of the island sued for, under direction of the Surveyor General of the United States, and testimony of the surveyor that his plat and notes were correct, even if the record was not signed by the surveyor.

SAME.—Transcript of Land Records by Auditor of State.—Evidence.— On such trial, a transcript of the survey and field notes of the island among the records in the land department of the State, properly authenticated by the Auditor of State, was correctly admitted in evidence.

SAME.—Riparian Rights.—Island in Wabash River.—Adverse Possession of Twenty Years.—Survey and Sale by United States.—Title of Purchasers Quieted.— In an action to recover possession of an island in the Wabash river, claimed by the owner of the adjacent land south, under riparian rights, as an accretion by reason of the partial filling up of the channel on his side of the thread of the stream, evidence that defendants were in continuous adverse possession more than twenty years before the commencement of the suit, and had purchased of the United States in 1857, after a survey ordered in 1849, and made in 1850; that when plaintiff purchased the island, in 1837, it had been omitted from the original survey, except to designate its location, and that he never had possession or exercised acts of ownership over the same, or asserted title thereto before this action, a verdict for the defendants is sustained by the evidence and supported by the law.

Bonewits v. Wygant.

From the Huntington Circuit Court.

B. M. Cobb, B. F. Ibach and G. W. Stultz, for appellant.
H. B. Sayler, L. P. Milligan and A. Moore, for appellee.

FRANKLIN, C.—This is a suit for the possession of an island, situated in the Wabash river, in Huntington county, Indiana, containing 8 acres and 24 rods.

Issues were formed by a denial, statute of limitations and cross complaint, to quiet title in defendants. Trial by jury; verdict and judgment for defendants.

Demurrer to cross complaint, motions for a *venire de novo* and for a new trial, all overruled, and excepted to.

The appellant claims title under a purchase from the general government, made April 4th, 1837, of the north fractional half of section 3, in township 27 north, and range 10 east. The appellees claim title under possession since 1850, and a purchase of the island from the general government in 1857.

The island is situated near the northwest corner of said section 3, on the section line dividing sections 3 and 34, about one acre of the island lying north of the section line; the river across the north end of the west half of said section 3 runs east and west with the section line in the river for that distance.

Appellant has assigned for errors the overruling of his motion for a *venire de novo*, his motion for a new trial, and his demurrer to the cross complaint.

The motion for a *venire de novo* is based upon an alleged uncertainty in the verdict, which reads as follows: "We, the jury, find for the defendants, and we find that John A. Wygant and Charles Wygant are the owners in fee simple of the land described in plaintiff's complaint." Defendants entered a remittitur as to all the lands except that part described in defendants' cross complaint, the defendant John Wygant having before trial entered a disclaimer.

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We see no uncertainty in the verdict, that would require it to be set aside and a *venire de novo* granted. The court did right in overruling the motion.

Appellant, in his brief, has not discussed his assignment of error in overruling the demurrer to the cross complaint, and that is considered as waived.

Appellant insists that he ought to have been granted a new trial, for the reasons alleged, that improper evidence was admitted on the part of appellees; that the verdict was not sustained by sufficient evidence, and was contrary to law. The evidence complained of was the introduction in evidence of the surveyor's record, containing the survey of the island by the county surveyor, under the direction of the surveyor general of the United States, made August 14th, 1850. The surveyor was present, and testified that he made the survey and the record, that the plat and field notes therein contained were correct.

We think this testimony was properly admitted, in order to identify the island with its proper description, even if the record was not signed by the surveyor.

A transcript by the auditor of state from the records of the land department at Indianapolis, containing the survey and field notes of said island, as testified to by said county surveyor, was also objected to. The transcript was properly authenticated, and we think correctly admitted as evidence.

The evidence shows, that prior to 1840, there was a channel of the river on both the south and north sides of the island. Since 1840, a bar formed at the east end of the island and across the channel on the south side of the island, and that channel has since partially filled up, until it has no current except in times of high water. That appellant and those under whom he holds have been in the possession and occupancy of the north fractional half of said section for more than forty years, but never have had possession of the island, nor exercised any acts of ownership over the same.

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A transcript from the records of the General Land Office at Washington City, of the original survey of the north line of said section 3, was given in evidence by the appellant. And if we understand the plat and field notes as contained in that transcript, the north fractional half of said section 3 does not contain in its description any part of the island. That the north line of said west half of said north fractional half was entirely upon the south side of the river. That no number of acres was designated on the plat for the island, and that no notice of the island had been taken by the surveyor, except to designate its location. While the island was not estimated in the number of acres offered for sale by the general government under the original survey, yet the doctrine that the riparian rights of the land-owner extend to the thread of the stream, except in our large actually navigable rivers, is well established in this State. And this right follows the changes of the thread of the stream, when the changes are made by the gradual washings and accretions of the soil. If the changes are made suddenly, without removing the intermediate soil, such as cut-offs, or the changing of the channel from one side of an island to the other, the riparian rights in the soil not moved by the water do not change with the thread of the stream.

"If there are islands in the river, they belong to the owner of the bank on whose side of the center they lie, or, if they divide the main channel, they will themselves be divided in ownership between the bank proprietors." Judge Cooley's essay on the title to land under fresh water lakes, ponds, and rivers, Cent. L. J., p. 1, July 8th, 1881, and authorities therein cited. This doctrine perhaps ought to be limited to islands that are too small to form a subdivision of lands in the survey, the same as the beds of lakes and ponds.

This island appears to have been regarded by the general government as an omitted tract of land in the original survey, and the Surveyor General, in 1849, directed a survey of

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the island to be made, which was done, and the island was sold by the general government in 1857. As to whether proprietors on the south side of the river adjacent to this island had riparian rights extending over the island, which might have been maintained had they been asserted within the proper time, it is unnecessary to decide, for it is very clear that the island has been held in adverse possession, under claim and color of title, for more than twenty years prior to the commencement of this suit.

It was taken possession of by one Armstrong, a stranger to appellant's chain of title, about the time of its survey in 1850, and under some pretended homestead or pre-emption claim, traded several times until 1857, when it was purchased by the occupying claimant from the general government, since which time it has remained in the continuous adverse possession and occupancy of appellees, and those under whom they hold, under an avowed claim and color of title. All of which was, during all of said time, with the full knowledge of the owners and occupiers of the said north fractional half of the west half of said section 3, and with full opportunities for them to have asserted their claim to said island if they so desired.

We think the evidence fully sustains the verdict, and the verdict is supported by the law.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, with costs.

Eiceman v. The State, *ex rel.* Leonard *et al.*

No. 8159.

EICEMAN v. THE STATE, EX REL. LEONARD ET AL.

GUARDIAN AND WARD.—Failure of Guardian to Render Account.—The language of section 9, 2 R. S. 1876, p. 589, which makes it the duty of a guardian to render an account at least once in every two years, under a penalty of ten per cent. damages, is too clear to require, or admit of, construction. The duty imposed is reasonable, and, if neglected, the burden imposed by the statute should be borne without complaint.

SAME.—Insufficient Answer to Complaint Assigning Failure to Report.—Bond.—Demand.—An answer by a guardian to a complaint of his ward, upon his bond, which avers that he was removed from his trust, re-appointed thereto, and again removed; that he has always made reports as required by law, unless prevented by sickness or unavoidable absence; that he was ignorant of the transfer of guardian business to the circuit court, and thereby was once in default; that no injury resulted therefrom to his ward; that she was indebted to him for board; that she commenced her action just one hour after her marriage to her co-plaintiff, and before he could satisfy himself that he could safely turn over her estate to her, and that he has been willing and in a condition at all times since his removal to pay it over to her upon demand, but no demand has been made, is insufficient as a plea in abatement, while admitting the failure to report from May 8th, 1871, until August 5th, 1873, assigned as a breach of the bond.

PLEADING.—Answer.—Another Suit Pending.—Necessary Allegation.—An answer alleging that there is another suit pending for the cause of action declared upon, but not alleging when it was commenced, is bad on demurrer.

From the Spencer Circuit Court.

G. L. Reinhard and C. H. Mason, for appellant.
C. L. Wedding, for appellees.

MORRIS, C.—This suit is upon a guardian's bond. The complaint states that in May, 1870, the appellant was appointed guardian of the person and estate of Anna J. Staats, who, on the 26th of July, 1875, married the appellee John Leonard; that Eiceman, as such guardian, executed to the State his bond, with John C. French and John A. Wilburn, his sureties, in the sum of \$4,000, conditioned that Eiceman should faithfully discharge his duties as such guardian. Five breaches of the bond are assigned in the complaint.

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The appellant demurred separately to each breach assigned in the complaint. The demurrer was overruled. He then answered the complaint in five paragraphs. The appellee demurred to the first, third, fourth and fifth, separately. The demurrer was sustained to the first and fifth paragraphs, and overruled as to the third and fourth. The appellees then replied to the third and fourth paragraphs of the answer.

The rulings of the court upon the demurrs, to which exceptions were properly taken, are assigned as errors.

The appellant submits no argument, nor does he cite any authorities, in support of the demurrer to the first, third, fourth and fifth breaches assigned in the complaint. The objections to these breaches will therefore be considered as waived. It is alleged in the second breach, that on or about the 8th day of May, 1871, the appellant, as such guardian, rendered his account to the Court of Common Pleas of Spencer county, showing that he then had in his hands, as such guardian, \$1,462.22 in property. It is also stated that he had in his hands, on the 8th day of May, 1873, personal property belonging to the said Anna J., worth \$2,000, and real estate worth \$3,000, making in real and personal assets \$5,000; that said guardian failed and neglected to render to the proper court an account of his receipts and expenditures as such guardian, for a period of more than two years, to wit, from the 8th day of May, 1871, until the 5th day of August, 1873; that thereby the said guardian became indebted to the said Anna J., and that, in consequence thereof, she had sustained damages in the sum of \$500.

The statute upon this subject provides as follows: "It shall be the duty of every guardian of any minor: * * * To render on oath to the proper court an account of his receipts and expenditures as such guardian, verified by vouchers or proof at least once in every two years; and failing so to do, [he shall] receive no allowance for services, and be liable to his said ward on his bond for ten per cent. in dam-

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ages on the whole amount of the estate, both real and personal, in his hands belonging to such ward." 2 R. S. 1876, pp. 589, 590, sec. 9.

It is insisted by the appellant, that the above section should be construed to mean that a guardian failing to account, as required, shall be liable for any damages the ward's estate may suffer in consequence of such failure, not exceeding ten per cent.; that the breach is therefore bad, because it does not state facts showing that any actual damages had resulted to the estate of the ward from the failure of the appellant to render his account as required.

We can not adopt this view of the statute. Its language is too clear to require or admit of construction. Its obvious purpose is to require guardians having charge of the estates of minors to furnish, in permanent and reliable form, from time to time, statements of the condition of estates intrusted to their management, for the information of the proper court and the protection of wards. The duty imposed is reasonable, one which the guardian should willingly and faithfully discharge, and which he can not fail to perform except through censurable indifference to the interests of those whose estates he has undertaken to manage and preserve. If he neglects this duty, voluntarily assumed, he should bear, without complaint, the burden imposed by the statute. *Richardson v. The State, ex rel. Crow*, 55 Ind. 381.

The court did not err in overruling the demurrer to the second breach of the complaint.

The first paragraph of the answer is called by the appellant a plea in abatement, and is duly verified. It states that in 1873, Eiceman was removed from his guardianship, but that he was soon thereafter re-appointed; that he continued to act as such guardian until the November term, 1874, of said court, when he was again removed for failing to give a new bond, as required by the court. He states in a general way, that, up to the time of his second removal, he had

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discharged his duties as guardian of the said Anna J.; that he had not wasted nor cut down the timber growing on her real estate; that he had not converted her estate to his own use, nor made up any false and fraudulent report against her; that he had always made his reports to the proper court, at the proper time, unless prevented by sickness or unavoidable absence; that he was ignorant as to the law transferring the guardian business from the common pleas to the circuit court, and was for that reason, at one time, in default in making his report, but that no injury had resulted from such default to the relatrix; that he had arranged with the relatrix to board her for her work, but that she became sick, and was not able to do anything; that she is therefore indebted to him in a considerable sum for board; that since his last discharge until the marriage of the said Anna J., she being a minor, there was no person with whom he could settle his accounts, or to whom he could pay over the money and assets in his hands, as such guardian; that this suit was commenced just one hour after the said Anna J. was married, and before he could satisfy himself as to whether her husband was of the proper age to render it safe on his part to turn over the estate to the said Anna J.; that he had been at all times since his last removal willing and in a condition to pay over, upon demand, the estate to the said Anna J., but that no demand had been made. It admits that Eiceman had failed to make reports as required by law. The paragraph is in answer to the whole complaint, yet it fails to answer the second breach assigned. Indeed, it admits the failure complained of in this breach.

The appellant does not admit directly that he was indebted to the relatrix at the commencement of this suit, but that he was largely indebted to her as such guardian is plainly and clearly inferable from the facts stated.

We think the court did not err in sustaining the demurrer

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to the first paragraph of the answer. And in view of the facts pleaded, though the relatrix delayed but an hour, we can not say that she was unduly prompt in the commencement of this suit.

The fifth paragraph alleges that there is another suit pending in the same court, in which the appellees are plaintiffs and the said Eiceman, French, Wilburn and one more are defendants, and that it is for the same cause of action declared upon in this suit. When the other suit was commenced—whether before or after this suit was commenced—is not stated.

The demurrer was properly sustained to this paragraph. The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, at the cost of the appellant.

75	50
125	500
75	50
131	200
132	165
75	50
134	356
75	50
140	644
141	127

No. 8037.

GOULD ET AL. v. STEYER ET AL.

DECEDENTS' ESTATES.—Will.—Executor.—Suit on Bond for Failure to Pay Legacy.—The proper person to pay a legacy is the executor, or the administrator with the will annexed, and for a failure to pay it he may be sued on his bond. A suit for such failure may be maintained without any previous order of court that the legacy be paid, and without the previous removal of the officer.

SAME.—Pleading.—Complaint.—Necessary Averments.—A complaint by a legatee against residuary legatees, to recover a legacy, which avers neither that the estate of the testator has been finally settled, nor that the executor or the administrator with the will annexed has been discharged, fails to show a cause of action, upon the demurrer of plaintiff to an answer thereto.

SAME.—Answer.—Demurrer.—Search for Error.—A demurrer to an answer will search the record and reach back to the complaint, and if the complaint fail to show a sufficient cause of action, it should be sustained as to it, and not as to the answer.

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From the Franklin Circuit Court.

J. F. McKee and D. W. McKee, for appellants.
S. S. Harrell, for appellees.

BICKNELL, C.—This was an action by one of several legatees and her husband against the others and their husbands, to recover a legacy.

The following are the facts stated in the complaint:

Solomon Kistler, whose will was entered for probate in Hamilton county, Ohio, gave thereby all his estate, real and personal, to his widow for life; the will directed that, after the widow's death, five hundred dollars should be paid to the said Abilene Gould, and that the residue of the estate should be given in certain proportions to the said Phœbe Steyer, James Arnold and Emily Baldridge, now the wife of Preston Carpenter. The widow elected to take under the will. Samuel Bowles was appointed administrator with the will annexed; said administrator paid off all the debts of the testator, and then had in his hands eight hundred dollars, which was the entire proceeds of said estate, after the payment of said debts; the widow then bought certain real estate in Franklin county, Indiana, and, at her request, said administrator "paid to the grantor of said real estate" said sum of eight hundred dollars, and the deed was made to the widow. She died "on the — day of —, 187—," in possession of the land last mentioned, and of three hundred dollars' worth of kitchen and household furniture, etc., belonging to the estate of the testator. After her death, the said Phœbe Steyer and George Steyer took possession of said land last mentioned, and of said personal property, and they continue to hold it. Said Abilene has not received any part of her said legacy, and said last mentioned land and personal property are all that is left of the testator's estate, from which money can be derived to pay said legacy. The complaint prays that all of said last mentioned property may be sold, and that of the pro-

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ceeds five hundred dollars may be paid to said Abilene "as a legacy by virtue of said will," and that said Emily Carpenter and her husband, Preston Carpenter, and said James Arnold may answer as to their interest, and for all proper relief.

The appellees Phœbe Steyer and George Steyer appeared ; the other appellees were defaulted. The Steyers answered the appellants' complaint in three paragraphs. The first paragraph was the general denial ; the second and third were special defences. The appellants demurred to each of the special defences for want of facts sufficient, etc. The court below overruled the demurrer to the second defence, and sustained the demurrer to the third defence. The appellants refused to plead further as to said second defence, and judgment was rendered for the appellees. The appellants assign error as follows : "The court erred in overruling the demurrer to the second paragraph of the answer."

The appellees Phœbe Steyer and George Steyer assign cross errors, one of which is as follows :

"8th. The court erred in sustaining the demurrer to the third paragraph of the answer, and in refusing to carry such demurrer back to the complaint and sustain it thereto."

If the complaint failed to show a sufficient cause of action, the demurrer to the answer reached back to the complaint, and should have been sustained as to it, and not as to the answer. *Sugar Creek Township v. Johnson*, 20 Ind. 280. Such a demurrer will search the record and will test the sufficiency of the complaint, even without an assignment of cross errors. *The Aetna Ins. Co. v. Baker*, 71 Ind. 102.

The proper person to pay a legacy is the executor, or the administrator with the will annexed. *Crist v. Crist*, 1 Ind. 570. For a failure to pay it he may be sued on his bond. 2 R. S. 1876, p. 549, sec. 162; *Heady v. The State*, 60 Ind. 316. And such a suit may be maintained without any previous order of court that the legacy be paid, and without the previous removal of the officer. *Heady v. The State, supra.*

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In *Highnote v. White*, 67 Ind. 596, a legatee brought suit against an administrator to recover the possession of specific personal property, bequeathed to a widow for life and after her death to said legatee. It was held that he could not recover before the final settlement of the estate. See also *Fillingin v. Wylie*, 3 Ind. 163.

In the complaint now under consideration, it is not shown where the testator died, nor where his will was probated. The allegation is it was "entered for probate in Hamilton county, Ohio." It is averred that, by his will, the testator devised all his estate, real and personal, to his widow for life, and directed that after her death five hundred dollars should be paid to Abilene Gould, and the residue of the estate divided among the appellees; but it is not averred that he died the owner of real estate or of personal estate, or both; nor is it stated where any of the estate was. It is averred that the widow elected to take under the will, and that an administrator with the will annexed was appointed, "duly appointed" is the language, and that he paid all the testator's debts, and then had in his hands eight hundred dollars, "which was the entire proceeds left after payment of said debts." It is not stated whether these proceeds were derived from the sale of personal property, or of real property or both.

Under the will, it was *prima facie* the duty of the administrator with the will annexed to pay this sum of eight hundred dollars to the widow. Substantially he did it. The averment is, that the widow bought certain land in Franklin county, Indiana, and that at her request the administrator with the will annexed paid to the grantor of said land said sum of eight hundred dollars, and the deed for said land was made to the widow. The price of this land is not stated, nor is it shown what proportion of the price was embraced in said eight hundred dollars. It is averred that the widow died in possession of the land thus purchased, and of three hundred dollars' worth of household and kitchen furniture,

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etc., held by her under the will, and that said last mentioned land and property are all that is left of the testator's estate, from which money can be derived to pay the appellant's legacy, and that the appellees Phœbe Steyer and George H. Steyer are in possession thereof, and that the appellant Abilene Gould has not received any part of her legacy.

A copy of the testator's will is annexed to the complaint. Its language is as follows: "After my lawful debts and funeral expenses are paid, I make the following disposition of my property, both personal and real. I will that my wife Abigail shall be possessed, during her natural life, of all the property, both real and personal, to be used by her for her comfort and support, as she in her wisdom and prudence may think best, being persuaded that she will do what she thinks right and best. After the death of my wife, I will that five hundred dollars be paid to our daughter Abilene Gould, wife of William Gould, for her benefit and use.

"I will that the rest and residue of my estate be divided into two equal shares, one share to be given to my daughter Phœbe, now the wife of H. Steyer, by her to be held and used as in her wisdom she may desire, and the other share to be divided between our grandchildren, James Arnold and Emily Baldridge, his sister, they being the children of our daughter, Mary Arnold, deceased; the above bequest to be paid to my heirs as soon after the decease of my wife as may be found practicable and advisable." The will is dated in August, 1865.

It is not averred in the complaint that the estate of the testator has been finally settled, nor that the administrator with the will annexed has been discharged.

The cases hereinbefore cited, 1 Ind. 570, 3 Ind. 163, 60 Ind. 316, 67 Ind. 596, show that there is no sufficient cause of action in the appellants' complaint. It is therefore unnecessary to examine the other cross errors assigned by the appellees. There was no error of the court below available to the

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appellant. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellants.

No. 7754.

HUTCHINSON v. LEWIS.

SLANDER.—Pleading.—Averments.—Where the complaint in an action for slander averred that the defendant spoke “of and concerning the plaintiff” the following false and defamatory words: “I saw Lee Jones (meaning plaintiff),” etc., it is not necessary to further aver that the plaintiff was known by such name.

SAME.—Complaint.—Demurrer.—Practice.—Where, in such action, the complaint charges two sets of slanderous words, if either is sufficient, a demurrer to the complaint for want of facts should be overruled.

SAME.—Actionable Words.—Words charging the plaintiff with being a whore are actionable *per se*.

SAME.—Statement of Witness Privileged.—Presumption of Privilege, How Overcome.—All statements of a witness, as a general rule, are absolutely privileged; and those that are not are presumptively so, and before a witness can be held liable for statements made in a judicial proceeding, this presumption must be overcome by showing affirmatively that such statements were false and malicious.

SAME.—When Statement of Witness Privileged.—Evidence.—Malice.—Where, in an action for slander, it is shown that the defendant was subpoenaed as a witness in a cause, testified upon the trial, and as a witness made the statement complained of, and it is not shown that the statement was impertinent and immaterial, or that it was not responsive, or that he wandered from the case to gratuitously make the statement, or that it was not relevant or not made in the faithful discharge of his duty as a witness, under these circumstances such statement is absolutely privileged; but, if it were not, it would be presumed to be, and, before a recovery could be had, malice in making the statement must be shown.

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SAME.—Privileged Statements of Witness Can not be Used Against him.—A statement made by the defendant after he had testified as a witness in a case, not actionable standing alone, and not proving any set of words declared upon in such action, can not be aided by a statement made by him as a witness which is privileged, so as to make such former statement slanderous.

PRACTICE.—Verdict.—Evidence.—Failure of Proof.—Supreme Court.—The rule, that the Supreme Court will not disturb a verdict when there is any evidence tending to support it, has no application to a case where there is an entire failure of proof.

From the Montgomery Circuit Court.

J. Wright, J. M. Seller, R. B. F. Peirce, G. W. Paul and J. E. Humphries, for appellant.

J. R. Courtney, for appellee.

BEST, C.—This was an action of slander, brought by the appellee against the appellant. The complaint originally consisted of four paragraphs, but after the issues were formed the third and fourth were withdrawn.

It was averred in the first that the defendant spoke of and concerning the plaintiff, in the presence of Samuel G. Irwin and others, the following false and defamatory words: “I saw Lee Jones (meaning plaintiff) out in the woods, last fall a year ago, with Oscar Davis. She (meaning plaintiff) had her clothes up around her waist, and he (meaning said Davis) was so close to her (meaning plaintiff) that I could not see between them.”

In the second paragraph it is averred that the defendant, in the presence of John Canine and others, spoke of and concerning the plaintiff, in addition to the language set out in the first paragraph, the following false and slanderous words: “She (meaning plaintiff) is a woods whore, and I can prove it by John Wilkison.”

A demurrer for want of facts was overruled to each paragraph of the complaint, and an exception reserved. An answer in denial, with some special pleas that need not be further noticed, was filed.

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Trial by jury ; verdict for \$300 ; motion for a new trial for the reason, among others, that the verdict was not sustained by sufficient evidence ; overruled and an exception ; final judgment. From this judgment the appellant appeals, and assigns as error the order of the court in overruling the demurrer to each paragraph of the complaint, and in overruling the motion for a new trial. The objection urged to the first paragraph of the complaint is, that there is no averment that the appellee was known by the name of "Lee Jones." There is nothing in this objection. Section 86 of the code provides that, "In an action for libel or slander, it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff," and the averment is that the language was spoken "of and concerning the plaintiff." This was sufficient. The demurrer was properly overruled.

The only objection urged to the second paragraph is, that there is no averment that Oscar Davis was not the husband of the plaintiff at the time the offence therein charged is imputed to her. However much force there may be in this objection, as applied to the language imputing an offence to the appellee with Davis, it can have none whatever when applied to the other charge contained in this paragraph. The demurrer was not limited to a single set of words, but was general, and, therefore, if either set was sufficient, it was properly overruled. The second set was actionable *per se*, and it was immaterial whether the appellee was a married or an unmarried woman. The demurrer to the second paragraph was also properly overruled.

The appellant insists that the court erred in overruling the motion for a new trial, because the evidence was not sufficient to sustain it, and we concur with him in this conclusion. The evidence for the appellee, to prove the speaking of the words, is very brief, and is as follows :

James Hutchinson, the defendant, testified : "My name is James Hutchinson, and I am the defendant in this cause

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now on trial ; I did not tell Wright and Seller anything about the plaintiff in this suit ; I was subpoenaed as a witness on the trial of the case of this plaintiff against Samuel G. Irwin and Mary J. Irwin, in this court, and on the morning of the day of the trial I was in the law office of Wright and Seller, and they asked me what my evidence would be, and I refused to tell them ; I was a witness and testified on the trial of the cause just mentioned, between this plaintiff and the Irwins, for slander ; on the trial of that cause I testified that"—and then follows almost literally the language imputed to him in the first paragraph of the complaint, which it is unnecessary to repeat.

On cross-examination, he said : "After the Irwins were sued by this plaintiff, one of them, Dr. Samuel G. Irwin, came to me and wanted to know what I knew about her ; I refused to tell him anything about what I had seen or what I knew, and I never did tell Dr. Irwin, or any one else, what I had seen until I testified as a witness in that case in court ; I live in this county, and was regularly served by subpoena to be present as a witness on the trial of that cause, on behalf of defendants ; my testimony on that trial was true ; I saw the plaintiff and Oscar Davis just as I described in my testimony."

John Canine testified : "My name is John Canine, and I live in this city ; I know the parties to this suit ; during the progress of the trial of the case of this plaintiff against the Irwins I was here, and one day was standing down on the front steps of the court-house, after Hutchinson had testified, and I asked him if he was certain that she is the woman you saw out in the woods, and he said, 'Yes ; I am certain.' "

On cross-examination, he said the conversation was a casual one of his own seeking, and the reason he made the inquiry was, that he had been waiting upon the plaintiff.

Samuel G. Irwin testified that the plaintiff had sued him and his wife for slander ; that it was a different thing from the act testified to by the defendant ; that he learned from

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others that the defendant would make a good witness for him, and that he went to see him about it; but he refused to tell him anything about what he had seen or knew; that he became satisfied, from his manner and from some remarks, that he knew something about it, and he said: "I had him regularly served with a subpoena as a witness for myself and my wife in that suit. He was sworn and testified as a witness; I heard his evidence on that trial; he said"—and then follows the language set out in the first paragraph of the complaint.

On cross-examination, he said: "At the time I first went to Hutchinson to see what he knew, my case was pending in this court, and I was hunting up evidence for the trial; I had two or three talks with Hutchinson, and tried very hard to get him to tell me what he knew, but he refused absolutely to tell me anything about it, and I determined to take the risk of using him any way; I had him regularly subpoenaed and required his attendance as a witness; I heard his statement for the first time when he testified as a sworn witness upon the stand."

The appellee testified that in September, 1876, she was at her home, about twenty miles distant from the woods where appellant testified that he had seen her and Davis. This was all the evidence given in chief, and all tending to support the charge. Was it sufficient? We think not. It will be observed that there was none at all to prove the speaking of the second set of words set out in the second paragraph of the complaint. The testimony of the appellant and of Samuel G. Irwin, the only witnesses who testified as to the speaking of the words, show that they were spoken as a witness, upon the trial of a cause, brought by appellee against Irwin and wife for slander, and appellant claims that this communication is absolutely privileged. The rule on this question is thus stated in Townshend on Libel and Slander, section 223: "The due administration of justice requires that a witness should speak, according to his belief, the

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truth, the whole truth, and nothing but the truth, without regard to the consequences ; and he should be encouraged to do this by the consciousness that, except for any wilfully false statement, which is perjury, no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him." This is a correct statement of the law upon this subject. 1 Hilliard Torts, p. 322 : Cooley Torts, p. 210 ; *Calkins v. Summer*, 13 Wis. 193 ; *Nelson v. Robe*, 6 Blackf. 204 ; *Grove v. Brandenburg*, 7 Blackf. 234. The rule, however, assumes that the witness will not abuse his privilege by making statements which are impertinent and immaterial, and which are not in fact, nor does he believe them to be, responsive to questions propounded to him. All statements of a witness, as a general rule, are absolutely privileged. Those that are not are presumptively so, and, therefore, before a witness can be held liable for the latter this presumption must be overcome by showing affirmatively that such statements were false and malicious. When this is done, the protection of the law is withdrawn, and he is liable precisely as though such statements were not made in a judicial proceeding. As all the statements of a witness, as a general rule, are absolutely privileged, all are presumed to be so, and, therefore, where nothing is shown, except that the statement was made as a witness in a judicial proceeding, such statement must be regarded as absolutely privileged. Before it can be otherwise treated, it must affirmatively appear that it is not within the general rule.

Applying these principles to the statement in question, it is obvious that the appellant incurred no civil liability in making it. It is shown that he was subpoenaed as a witness in an action for slander ; that, in obedience to the process of the court, he attended and testified as a witness upon the trial, and as a witness made the statement. This is all. It is not shown that his statement was impertinent and imma-

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terial, or that it was not responsive, or that he wandered from the case to gratuitously make the statement. In short, nothing appears to indicate that the statement was not relevant, that it was not responsive, and that it was not made in the faithful discharge of his duty as a witness. Under these circumstances, the statement falls within the general rule, and is absolutely privileged. Again, if it were not, it would be presumed to be, and before a recovery could be had malice must be shown. Cooley Torts, 211.

There was no evidence whatever of any malice in making the statement, and without it there could be no recovery, even if the statement should not be regarded as absolutely privileged.

The appellee concedes that this statement is within the rule exempting the appellant from liability, but insists that the rule is an unwise one, not founded in reason, and ought to be disregarded. We think otherwise, and, although requested, do not feel like reviewing the authorities that sustain it, nor stating the reasons that support it.

The appellee also insists that the statement made to John Canine is sufficient to support the verdict. We do not think so. The inquiry made by Canine of appellant was: "Are you certain that she is the woman you saw out in the woods?" His answer was: "I am certain." Assuming that the inquiry was about the appellee, the answer was not slanderous. Standing alone, it was not actionable, nor did it prove any set of words declared upon. It could not be aided by the statement of appellant, made as a witness. Such statement, as we have shown, was privileged, and created no liability—none as a substantive cause of action—nor could it be used or considered for any purpose whatever. Without this statement, the answer to Canine proved nothing, and, as there was no other evidence tending to prove the speaking of the words, the evidence was insufficient to support the verdict. We are not unmindful of the rule, that

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this court will not disturb a verdict when there is any evidence tending to support it, but this rule does not apply to a case where there is an entire failure of proof. 2 G. & H., p. 116, sec. 96; *The Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339.

For these reasons, we think, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed, at the costs of the appellee, with instructions to grant a new trial.

No. 9384.

COOPER *v.* THE STATE.

CRIMINAL LAW.—Disturbing Religious Meeting.—Affidavit.—Statute Construed.—An affidavit in a prosecution for disturbing a religious meeting, under the act of March 3d, 1859, 2 R. S. 1876, p. 472, must allege, and it must be proved upon the trial, that the meeting disturbed was a collection of inhabitants of this State.

SAME.—Evidence.—Verdict.—Where, on the trial in such a prosecution, no evidence was offered either proving or tending to prove that the meeting was composed of inhabitants of this State, either in whole or in part, a verdict of conviction is not sustained by sufficient evidence.

From the Pike Circuit Court.

E. A. Ely and C. H. Burton, for appellant.

D. P. Baldwin, Attorney General, *A. H. Taylor*, Prosecuting Attorney, *F. B. Posey* and — *Wilson*, for the State.

NIBLACK, J.—This was a prosecution commenced before a justice of the peace.

The affidavit charged the appellant, Stephen Cooper, with having, on the 8th day of January, A. D. 1881, at the county of Pike, in this State, unlawfully interrupted, molested

Cooper *v.* The State.

and disturbed a certain collection of divers inhabitants of the State of Indiana, met together for religious worship, by then and there talking loudly, laughing, cursing and swearing.

The appellant was convicted before the justice, and he appealed to the circuit court, where a jury found him guilty as charged in the affidavit. After denying a motion for a new trial, that court rendered judgment upon the verdict.

So much of the act upon which this prosecution is based as relates to the particular offence charged substantially provides that any person who, being the owner or proprietor of any real property within one mile of any collection of any inhabitants of this State, met together for worship, shall rent or permit the same to be used for any of certain prohibited purposes, or "who shall, by any loud and unnecessary talking or hollowing or by any threatening, abusive, profane, or obscene language or violent actions, or by any other rude behavior, interrupt, molest or disturb such religious meeting, * * * or any person present thereat, or going to or returning therefrom, * * * shall be fined in any sum not more than twenty-five dollars nor less than five dollars." Act of March 3d, 1859, 2 R. S. 1876, p. 472.

It will thus be seen that, by inadvertence or from some unexplained motive of public policy, this act only extends its protection to collections of persons met together for religious worship, when such collections are composed, to a substantial extent at least, of inhabitants of this State.

The affidavit in this case seems to have been framed upon that theory, as it alleged that the meeting disturbed consisted of divers inhabitants of this State. That allegation was thus recognized as being, as it was in fact, material to the sufficiency of the affidavit under the statute above referred to. It was, therefore, incumbent upon the State to prove that the meeting alleged to have been disturbed was a collection of inhabitants of the State of Indiana. Moore's Criminal Law, sec. 684.

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There was no evidence upon the trial either proving, or tending to prove, that the meeting was composed of such inhabitants, either in whole or in part. Upon that branch of the case no evidence of any kind was presented. The verdict was consequently not sustained by sufficient evidence, and a new trial ought to have been granted.

As the judgment must at all events be reversed, we have not carefully considered some other questions discussed by counsel.

The judgment is reversed, and the cause remanded for a new trial.

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No. 8054.

PAULMAN ET UX. v. CLAYCOMB.

PROMISSORY NOTE.—Right of Holder to Collect.—The possession of a promissory note by a reputable person, other than the payee, is *prima facie* evidence of the authority of such person to collect it, whether it is endorsed by the payee in writing or not.

SAME.—Evidence.—Presumption.—Practice.—Where the evidence for and against the authority of the holder of a promissory note to receive payment is equally balanced, the presumption arising from the possession thereof is sufficient to furnish a preponderance in favor of the authority of such holder to receive payment.

PRACTICE.—Objections to Interrogatories.—Bill of Exceptions.—Supreme Court.—Objections to an interrogatory propounded by the court to a jury must first be presented to the trial court, and its ruling preserved by a bill of exceptions, in order to make such objections available in the Supreme Court.

SAME.—Improper Argument of Counsel.—Change of Venue.—Instruction.—Presumption.—Where, on the trial of a cause on a change of venue from another county, that fact is alluded to by counsel in the argument to the jury, it is not error for the court to instruct the jury that such allusion was improper; and where the record on appeal does not disclose what was said by counsel, nor who said it, the Supreme Court can not presume that what was said was said by appellant's counsel, or was properly said by them, or that the appellant was injured by such instruction.

Paulman et ux. v. Claycomb.

MARRIED WOMAN.—Separate Property.—Consent to Transfer.—Instruction.—Husband and Wife.—Upon the trial of an action by a married woman to foreclose a mortgage executed to her, in which the question arose as to whether she had agreed or consented to a transfer of the notes secured thereby to a creditor of her husband, to whom the payee alleged he had paid the notes, the court instructed the jury that a married woman “can not be divested and deprived of her notes or other property by her husband or any one else, without her agreement and consent.”

Held, that “or” and not “and” should have connected the words “agreement” and “consent” in such instruction.

SAME.—Consent of Husband to Transfer of Wife's Personal Property.—Case Distinguished.—Prior to the act of March 25th, 1879, Acts 1879, p. 160, under the law in this State, a married woman could not transfer her separate personal property except by the consent of her husband, but it was not necessary that such transfer should be by deed in which the husband should join; and, when the consent of the husband was obtained, it was not material how such consent was evidenced. *The American Ins. Co. v. Avery*, 60 Ind. 566, distinguished.

From the Spencer Circuit Court.

C. H. Mason, S. B. Hatfield, G. L. Reinhard, W. L. Lamb, C. Worral and —— Meyers, for appellants.

C. A. DeBruler, E. R. Hatfield and W. Henning, for appellee.

BEST, C.—This action was brought by the appellee to foreclose a mortgage made by the appellants to her to secure the payment of two notes, one of \$300 and the other of \$400, both of which had matured when the suit was commenced.

The appellants answered :

1st. Payment generally.

2d. That the appellee, with the consent of her husband, delivered the notes for collection to one James Casey, to whom they paid them.

3d. That Stephen Claycomb, the husband of the appellee, was indebted to the firm of Reynolds & Casey in the sum of \$777.25, and was, with the appellee and their family, about to remove from this State to Arkansas ; that, to secure the pay-

Paulman et ux. v. Claycomb.

ment of this debt, Reynolds & Casey threatened to attach their goods, and, to avoid this, the appellee, with the consent of her husband, delivered the notes to Reynolds & Casey, with authority to collect the same and apply the proceeds in payment of their claim ; that while they thus held the notes the appellants paid them.

4th. That the appellee, with the consent of her husband, transferred, by delivery, the notes to the firm of Reynolds & Casey, to whom the appellants paid them while they so held them.

The appellee replied in denial.

The issues thus formed were twice submitted to a jury in Perry county, each of which disagreed. The venue was then changed to Spencer county, the issues again submitted to a jury, and a verdict returned for the appellee for \$774.90. A motion by appellants for a new trial, upon written reasons filed, was overruled, an exception reserved, and a judgment entered upon the verdict. From this judgment the appellants appeal, and assign as error the order of the court in overruling their motion for a new trial.

The evidence is in the record, and tends to show that the appellants paid the notes to Reynolds & Casey, to whom the husband of the appellee, without her indorsement, had transferred them as security for the payment of his debt to them. Such payment was made to them while they had possession of the notes, and the principal question of fact was, whether the appellee had authorized her husband to make such transfer. If she had, the payment of the notes by the appellants to Reynolds & Casey, while they thus held them, would extinguish them, and constitute a complete bar to the suit. There was testimony tending to show that she had either authorized or consented to such transfer, and testimony also tending to show that she had done neither. With this evidence before the jury, the court was requested by the appellants, at the proper time, to instruct them as follows :

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"The possession of notes in the hands of reputable persons, other than the payee, is *prima facie* evidence of the authority of such person or persons to collect the same, whether the said notes are indorsed by the payee in writing or not."

This instruction is a correct statement of the law upon the subject, was applicable to the case made, and should, therefore, have been given. The disputed question of fact was the authority of Reynolds & Casey to receive payment of the notes. This the appellants asserted, and this the appellee denied. To establish the defence, it was necessary for the appellants to prove it, but this they might have done, in the absence of other evidence, by simply showing that Reynolds & Casey had possession of the notes when they paid them. Possession of the notes, *prima facie*, entitled them to the money. *Bush v. Seaton*, 4 Ind. 522; *Tam v. Shaw*, 10 Ind. 469; *Kimball v. Whitney*, 15 Ind. 280; *Mahon v. Sawyer*, 18 Ind. 73.

There was, however, other evidence for and against the authority of Reynolds & Casey to receive payment of the notes, but with this evidence the appellants were entitled to the benefit of such presumption as the possession of the notes by Reynolds & Casey raised. If the evidence for and against the alleged authority of Reynolds & Casey, aside from the possession of the notes, was equally balanced, the presumption of such authority arising from the possession of the notes was sufficient to furnish a preponderance in favor of appellants, though the burthen was upon them, and therefore they were entitled to have the jury instructed as requested.

The appellee's counsel insist there is no error in refusing to give this instruction, for the reason that the same point is covered by other instructions, but they do not point out any other instruction that covers this point, and, after a careful examination of all the instructions given, we are unable to find one upon this subject.

The appellant complains of an interrogatory propounded

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by the court, asking the jury whether the appellee "agreed and consented" that her husband should turn over the notes in suit to Reynolds & Casey as collateral security for the payment of his debt to them. In the language of the record, the appellants "excepted to the giving of this interrogatory," without objecting to its form or its pertinency, and all objections urged are made for the first time in this court. This can not be done. Such objections must be presented to the lower court, and its ruling preserved by bill of exceptions, in order to make them available here. Again, as the general verdict was for the appellee, and no ruling was made upon the answer to the interrogatory, we are unable to perceive how it could have injured the appellants.

They also claim that the court prejudiced their case by instructing the jury as follows:

"It has been alluded to in argument that this case has been brought by change of venue from Perry county. This is all improper. That is not the question you are sworn to try. You are sworn to well and truly try the issues joined in this case between these parties, according to law and evidence, and a true verdict give thereon."

The record does not disclose what was said to the jury, nor who said it, and, therefore, this court can not presume that what was said was said by the appellants, or was properly said by them, or that they were injured by an instruction that seems to us to have been eminently proper if anything at all was said upon the subject.

The court said in the latter clause of the eighth instruction, that a married woman "can not be divested and deprived of her notes or other property by her husband or any one else, without her agreement and consent."

The objection urged to this instruction is that "or" and not "and" should have connected the words "agreement" and "consent," and we are of opinion that the instruction, as applicable to the facts in this case, is subject to this criticism.

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Some other rulings are discussed by the appellants, but, as none of them will necessarily arise upon another trial, they will not be considered.

The appellee insists that a married woman in this State can not transfer her personal property except by deed, in which her husband shall join, and as no such transfer was made in this case, the judgment should, therefore, be affirmed.

This conclusion is reached by assuming that, since a married woman can not encumber or convey her lands "except by deed, in which her husband shall join," and since her personal property, "held by her at the time of her marriage, or acquired during coverture by descent, devise, or gift," remains her property "to the same extent and under the same rules as her real estate," therefore she can not transfer it "except by deed, in which her husband shall join."

In this we do not concur. The lands of a married woman are hers by statute, as fully as if she were unmarried, and so is her personal property, held or acquired as prescribed by the statute. Both are hers absolutely. She can not, however, encumber or convey the former without her husband's consent, and as she holds the latter "under the same rules" as the former, a reasonable construction of the statute will prohibit her from encumbering or conveying the latter without her husband's consent. Her ownership of both is absolute, but there is a limitation upon her power of disposition. This limitation is the consent of the husband. With it her right to encumber or convey either is as ample and complete as though she were unmarried. Here the analogy ceases. When the consent is obtained, how shall it be evidenced? In encumbering or conveying real estate by deed, the statute is explicit, and needs no construction. If a reason were wanted, however, for the rule prescribed by the statute, it will be found in the fact that the appropriate method of conveying the husband's contingent interest in the lands of the wife, and of preserving the evidence

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of the title, is by deed. The statute, however, does not in terms require the personal property of the wife to be transferred by deed, nor do we think it should receive such construction. The husband's consent is the only limitation imposed, and, when it is obtained, it is immaterial how evidenced. The profits of her real estate and her personal property, acquired as above, remain her separate estate, which she may, with the consent of her husband, dispose of at pleasure, and to construe the statute so as to require the sale of the profits of her lands, such as apples, peaches, pears, hay, grain, and other personal property owned by her, to be by deed, in which the husband shall join, would be practically placing an additional limitation upon her power of disposition, and would render the transfer of such property so inconvenient as to greatly diminish its value. In the case of *Collier v. Connelly*, 15 Ind. 141, which was a suit upon a note by the assignee of a married woman, whose husband had not indorsed the note, but who was present and consented to such assignment, the question arose whether his consent could be shown otherwise than by an indorsement of the note, and it was held that it could, and that such an assignment was valid. This case was cited and approved in *Moreau v. Branson*, 37 Ind. 195; and in *Baker v. Armstrong*, 57 Ind. 189, it was held that a married woman, with the consent of her husband, could make an equitable assignment of a note and mortgage. This has been the rule for more than twenty years, and we know of no good reason to depart from it. Nor is there anything in the case of *The American Ins. Co. of Chicago v. Avery*, 60 Ind. 566, in conflict with this conclusion. It was there said that a married woman has no power to encumber or convey her "separate estate" except by deed in which her husband shall join. The question in that case was whether the appellee had encumbered her real estate, and the court, in using the phrase "separate estate," was speaking of her real, and not of her

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personal property, and, therefore, that case can not be construed as holding that a married woman can not encumber or convey her personal property, except by deed, etc., as the appellee insists. Since the act of March 25th, 1879, a married woman may convey her separate personal estate as if she were sole; but this statute does not apply, as this transaction occurred before its passage.

For the failure of the court to instruct as requested by the appellants, we think the case should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things, reversed, with directions to grant a new trial, at the costs of the appellee.

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NO. 7251.

WILSON v. HAMILTON ET AL.

SPECIAL VERDICT.—*Venire de Novo.*—*Practice.*—A special verdict is not so imperfect as to require the issue of a *venire de novo*, simply because it fails to find either for or against all of the facts put in issue by the pleadings.

SAME.—*Evidence.*—*Presumption.*—*Finding.*—The Supreme Court will assume, in the absence of the evidence, that the special verdict contained all the facts proved, and that the trial court properly overruled a motion for a *venire de novo* for the reason that the special verdict contained the finding of the jury upon all the facts which had been proved.

SAME.—*Judgment.*—Where a special verdict is sufficient and free from objection, the rulings and judgment of the court thereon, which follow the verdict, will be sufficient and free from objection.

From the Shelby Circuit Court.

A. Blair, E. P. Ferris, W. W. Spencer and J. S. Ferris,
for appellant.

T. B. Adams and L. T. Michener, for appellees.

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Howk, J.—This was a suit by the appellant, Greenville Wilson, to perpetually enjoin the appellee Albert McCorkle, then the sheriff of Shelby county, from selling appellant's property, on a certain execution issued to the sheriff on a certain judgment, rendered in and by the court of common pleas of said county, on the 19th day of March, 1867, in favor of the appellee Hamilton, and against the appellant, for the sum of \$6,686.65, and costs of suit, and to compel the said Hamilton to credit said judgment with the sums paid thereon, and to receive the amount actually due on the judgment from the appellant. The substance of the appellant's complaint was, that he had paid, at divers times and places, divers large sums of money on said judgment to the appellee Hamilton, and his attorney, which had not been credited on the said judgment; that on the 20th day of December, 1876, and before the commencement of this suit, the appellant tendered to said Hamilton, and brought into court for his use, the sum of three thousand dollars, as the balance then due on the judgment, but that said sum was then and there refused by said Hamilton; that the appellant demanded of said Hamilton a receipt in full of the satisfaction of said judgment, and that he refused to receipt said judgment, and had received said three thousand dollars, and had wholly failed, refused and neglected to receipt the docket for any of the payments made by the appellant to him on said judgment, except one of \$500 made January 9th, 1873; and that, on the —— day of ——, 1873, the said Hamilton procured the issue of an execution, and caused the same to be placed in the hands of his co-appellee McCorkle, then the sheriff of said county, commanding him to levy on said judgment, of the appellant's property, the sum of \$10,-000, which was \$7,000 in excess of what the appellant owed said Hamilton. Subsequently, the appellant filed a second paragraph of complaint, alleging substantially the same facts as in the first paragraph, and praying for the same relief.

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The appellees jointly answered by a general denial of the complaint.

The issues joined were tried by a jury, and a verdict was returned into court, in the words and figures following, to wit :

"We, the jury, find for the plaintiff, and that he is entitled to the following credits upon judgment in suit, at the following dates, to wit :

"\$1,000.00, paid May 18th, 1867 ;
" \$ 500.00, paid January 2d, 1868 ;
" \$ 400.00, paid March 6th, 1868 ;
" \$ 259.00, paid June 22d, 1868 ;
" \$ 78.50, paid on account, December 20th, 1876 ;
" \$ 300.00, paid to defendant, January 26th, 1869 ;
" \$ 300.00, paid to defendant, January 26th, 1870.

(Signed) "MARTIN SNIPP, Foreman."

Thereupon the appellant moved the court for a *venire de novo*, which motion was overruled, and to this ruling he excepted. He then moved the court for a satisfaction of the judgment in controversy, on the verdict of the jury, except the sum of \$3,000 and interest from the 18th day of January, 1877, the date of the commencement of this action ; which motion was also overruled, and his exception was duly saved to this decision. On motion of the appellee Hamilton, the court then ordered and adjudged that an execution or order of sale be issued and delivered to the sheriff of said county, on the judgment described in the complaint, and that the clerk endorse on said writ "the dates and amounts of the credits named in the special verdict in this cause ;" that the clerk also enter on the proper judgment docket of the court, and in the proper case, "the dates and amounts of the credits named in said special verdict ;" and that the appellant recover of the appellees his costs in this suit.

The following decisions of the circuit court are assigned here, as errors :

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1. In overruling the appellant's motion for a *venire de novo*; and,
2. In overruling the appellant's motion for a satisfaction of the judgment in controversy, on the verdict of the jury, except the sum of three thousand dollars, and interest from the 18th day of January, 1877, the date of the commencement of this action.

We will consider and decide the questions presented and discussed by counsel, and arising under these alleged errors, in the order of their assignment.

1. The appellant's motion for a *venire de novo* was in writing, and two causes were assigned therein for the issuance of the writ, as follows:

1st. Because the special verdict did not find whether or not the judgment in controversy was all paid but \$3,000, at the time of the commencement of this suit, and herein the verdict was imperfect, in finding less than the whole matter in issue; and,

2d. Because the special verdict only covered a portion of the issue.

It will be seen from the verdict of the jury, an exact and literal copy of which we have already given, that it is somewhat indefinite and uncertain in its language; but it is clear, we think, that it can only be regarded as a special verdict. It was called a special verdict by the appellant's counsel in their written motion for a *venire de novo*, and it was so regarded and acted upon by the court below in its rulings in relation thereto and in its judgment thereon. It should be construed, therefore, as if it read as follows: "We, the jury, find that the plaintiff is entitled to the following credits upon the judgment in suit, at the following dates," etc. It is claimed by the appellant's counsel, as we understand them, that the special verdict in this case was and is imperfect, because it failed to find either for or against certain facts, which were alleged in the complaint and denied by the

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answer, and thus put in issue. If it were true that, in a special verdict, the jury must find upon all the facts put in issue by the pleadings, even though some of such facts may not be supported by any evidence whatever, then it would seem to us that the position of counsel was correct, and that the appellant's motion for a *venire de novo* ought to have been sustained.

But in section 335 of the code it is provided, as a definition, as follows : "A special verdict is that by which the jury find the facts only, leaving the judgment thereon to the court." 2 R. S. 1876, p. 171. In the recent case of *Graham v. The State*, 66 Ind. 386, this provision of the code and the provision of section 341 of the code, in relation to a special finding by the court, were carefully considered by this court, with especial reference to the precise point we are now considering in the case at bar. In the case cited it was said by WORDEN, C. J., speaking for the court :

"Neither a special verdict nor a special finding can do more in relation to facts than to find or state them. But what facts are to be thus found or stated? Clearly those that are proved upon the trial, and none other. When the special verdict has found the facts proved on the trial, it has performed its entire office ; and when the special finding has stated the facts proved on the trial, it has performed its entire office, so far as the facts are concerned. Of course the facts may be proved by circumstances or otherwise, as in any other mode of trial.

"But suppose there are issues in the cause concerning which no evidence is given. There is nothing in such case in relation to those issues for the court or jury, in finding specially, to pass upon. No fact in relation to them has been proved, and, hence, no fact in relation to them is to be found or stated, because, as we have seen, the special verdict or finding is confined to the facts proved. In the case supposed, it would seem that, in rendering judgment, the

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issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies."

Under the statutory provisions above quoted and referred to, and under the construction given thereto by this court, in the case last cited, we are of the opinion that the special verdict in the case now before us was not so imperfect, as the case comes before us, as to require the issue of a *venire de novo*, simply because it failed to find either for or against all of the facts put in issue by the pleadings. The evidence is not in the record in the case now before us, and we are bound to assume, in the absence of the evidence, that the special verdict contained all the facts proved, and, as we have seen, the statute does not require that the jury should find any of the alleged facts in issue which were not proved, or that they should negative any such facts in their special verdict. So, also, we must assume, in the absence of the evidence, that the court very properly overruled the appellant's motion for a *venire de novo*, for the reason that the special verdict contained the finding of the jury upon all the facts which had been proved, and this was all that the statute required it to contain. We think, therefore, that the first supposed error is not well assigned.

2. Our conclusion in this regard practically disposes of the second alleged error, for it is very clear that the court committed no error in overruling the appellant's motion for a judgment, which was not warranted or authorized by, and did not follow, the special verdict of the jury in this case. As we have held the special verdict to be sufficient and free from objection, it follows of necessity, we think, that the rulings and judgment of the court thereon, which follow the verdict, must be sufficient and free from objection.

The judgment is affirmed, at the appellant's costs.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

Burton et al. v. Reagan et al.

No. 7942.

BURTON ET AL. v. REAGAN ET AL.

PROMISSORY NOTES.—Pleading.—Answer.—Real Estate.—Mortgage.—Release.—Fraud.—Notice.—An answer by the makers of promissory notes, that they were given for balance of purchase-money of real estate; that by a decree of foreclosure it had been ordered that they pay the amount in suit to a mortgagee for prior purchase-money; that before the sale and conveyance to them the mortgagor had, by fraud, procured a release from the mortgagee, of which fraud they had no knowledge at the time of their cash payment of purchase-money and of their acceptance of the conveyance; that notice of the foreclosure suit was given by them to the plaintiffs; that their vendor was and still is insolvent; and that the plaintiffs had notice of the rights of the mortgagee before the notes were assigned to them by the mortgagor, is insufficient on demurrer.

SAME.—Notice of Suit.—Makers of Notes Must Defend.—Judgment.—Such notice by the defendants to the holders of notes does not make them parties; and the judgment is not binding upon them, although they may have caused an appeal in the defendants' names to be taken therefrom to the Supreme Court, and prosecuted to affirmance. The makers of the notes must defend and maintain them.

SAME.—Release Obtained by Fraud.—As between the parties thereto, a mortgage exists in full force, unaffected by a release which has been obtained by fraud from the mortgagee by the mortgagor.

SAME.—Innocent Purchasers.—Mortgage Lien.—Fraud.—Innocent purchasers of land take it discharged of a mortgage lien which has been released, although the release may have been obtained by fraud.

SAME.—Notice Before Payment Sufficient.—Notice before actual payment of all the purchase-money is equivalent to notice before the contract, and when there has been partial payment the purchaser will be affected, *pro tanto*, as to the residue.

SAME.—Presumption.—Notice of the fraud being admitted, in the absence of any averment that the conveyance to the defendants contained covenants of warranty, or that their vendor exhibited the release to them, or that they knew it had been obtained, or that they relied upon it, or that he practiced any fraud upon them, or that he made any statement or representation to them as to his title, the Supreme Court must presume that they took the land subject to the unpaid purchase-money, secured by the mortgage, and not as innocent purchasers, and hold that their answer contains no defence.

From the Owen Circuit Court.

F. J. Van Vorhis, for appellants.

W. R. Harrison and W. E. McCord, for appellees.

Burton et al. v. Reagan et al.

MORRIS, C.—This suit was commenced in the Morgan Circuit Court, and removed by change of venue into the Owen Circuit Court. The complaint is upon two promissory notes, executed on the 14th day of April, 1873, by Jesse Reagan and John W. Reagan to Sylvester and Leander Johnson, for \$500 each, one payable on the 1st day of January, 1876, and the other on the 1st day of January, 1877, and assigned by the payees to the appellants. The suit was commenced against the Reagans, the makers of the notes, but subsequently, at his instance, John W. Hadley, as assignee of Thomas W. Hadley, was made a party defendant.

The Reagans answered the complaint in two paragraphs, to which the appellants demurred separately. The demurrer to the first paragraph was sustained; to the second it was overruled. Hadley answered the complaint in one paragraph, to which a demurrer was filed and overruled.

The appellants replied to the answer of the Reagans in two paragraphs. The first was a general denial. To the second paragraph of the reply, the appellees, Reagans, demurred. The demurrer was sustained. The appellants replied to the answer of Hadley in four paragraphs, the first being the general denial. Hadley demurred to second, third and fourth paragraphs of the reply and his demurrer was sustained. The cause was submitted to the court for trial; finding for the appellees. The appellants moved the court for a new trial, on the ground that the finding was not sustained by the evidence, and was contrary to law. The court overruled the motion. The evidence is made part of the record by a bill of exceptions. Proper exceptions were also taken to the rulings of the court on the demurrs to the several answers of the appellees, and to the replies of the appellants. The errors assigned are, that the court erred in overruling the demurrs to the answers of the Reagans and Hadley, and in sustaining the demurrs to the replies of the appellants; also, in overruling their motion for a new trial.

Burton *et al.* v. Reagan *et al.*

The second paragraph of the answer of the Reagans admitted the execution of the notes sued on, and their assignment to the appellants, and then stated, in substance, that the consideration of said notes was the sale and conveyance by the payees to the makers, of certain real estate; that in 1865, one Thomas W. Hadley, being the owner of said real estate, sold and conveyed the same to Sylvester Johnson for the sum of \$9,000; that said Johnson executed to said Hadley a mortgage on said real estate, to secure the unpaid portion of the purchase-money; that in April, 1873, there being \$2,000 due Hadley on said mortgage, Sylvester Johnson, the mortgagor, to induce said Hadley to release said mortgage, falsely and fraudulently represented to him that he had negotiated a loan from an insurance company on said land, and all that was wanting to consummate the loan was a release of Hadley's mortgage; that, if Hadley would release it, he would procure the money and pay him the amount due on his mortgage—\$2,000; that Hadley, believing the statement so made to him, did execute and deliver to Johnson a release of the mortgage, upon the agreement that, if he did not get the money and pay Hadley, the release was to be surrendered as invalid; that Johnson had not negotiated a loan at all, never intended to, and never paid Hadley, but, in violation of his agreement, sold and conveyed the land, the next day, to the Reagans, for \$8,000, all of which was paid except two thousand dollars, for which the Reagans executed to him four promissory notes for \$500 each, payable to said Sylvester and Leander Johnson; that the notes sued on are two of the notes so executed by said Reagans to said Johnsons; that at the time of the payment of the \$6,000 of the purchase-money, and the acceptance of the conveyance of said land, the Reagans had no knowledge of the fraud practiced upon Hadley by said Johnson, but purchased the same in good faith; that said Johnson was then and is still insolvent; that said Hadley after-

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ward commenced a suit in the Morgan Circuit Court against said Sylvester Johnson and the Reagans, which resulted in a judgment in favor of Hadley against said Johnson for the unpaid purchase-money due him on his mortgage, and a decree ordering and directing said Reagans to pay the amount of the notes in suit to said Hadley; that the Reagans, during the pendency of said suit, notified the appellants of it, and requested them to appear to the same and protect their interests; that the appellants did not appear to said suit, but, after it had been determined adversely to the Reagans, they promised not to sue the Reagans until the same should be decided by the Supreme Court, if the Reagans would allow an appeal to be taken in their names; that an appeal was taken to the Supreme Court, and the judgment of the court below affirmed. It is also averred that the appellants had notice of the rights of Hadley before the notes were assigned to them by the Johnsons.

We do not think that the notice given the appellants by the Reagans of the pendency of Hadley's suit against them and Johnson, made the judgment in the case binding upon them. It was for the Reagans to defend and maintain the notes which they had executed. They could not, by notice to the appellants, require them to defend their acts. What the notice contained, whether anything more than that a suit was pending, is not alleged. If the appellants were proper parties to the suit, they should have been made such in the proper way. The notice alleged to have been given did not make them parties, nor are they bound by the judgment.

The question is, do the facts stated show that Hadley had a right to require the Reagans to pay to him the \$2,000 for which the notes in suit were given?

It is very clear, upon the facts stated, that the release of Hadley's mortgage was obtained by fraud. It is equally clear that, as between Hadley and Johnson, the mortgage still existed in full force, unaffected by said release. Rea-

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gan v. Hadley, 57 Ind. 509; *Lilly v. Quick*, 1 Green Ch. 97; *Middlesex v. Thomas*, 5 C. E. Green, 39; *Grimes v. Kimball*, 3 Allen, 518; *Weir v. Mosher*, 19 Wis. 330; *Eggeman v. Harrow*, 37 Mich. 436; *Ellis v. Lindley*, 37 Iowa, 334. But, if the Reagans were innocent purchasers of the land, they took it discharged of the mortgage lien of Hadley. Were they innocent purchasers? Upon this subject, Sugden says:

“Notice, before actual payment of all the purchase-money, although it be secured, and the conveyance actually executed, or before the execution of the conveyance, notwithstanding that the money be paid, is equivalent to notice before the contract.” 2 Sugden Vendors, 7th Am. ed., 533. The rule stated by Sugden has been approved and followed by this court in the case of *Dugan v. Vattier*, 3 Blackf. 245. In the case of *Lewis v. Phillips*, 17 Ind. 108, WORDEN, J. says: “There are few, if any, cases, holding that the payment of part of the purchase-money, before notice, although the purchaser has taken a conveyance, is sufficient to enable him to hold the land, as against him who has a prior equitable right. But, while this is the case, there is an evident tendency, in the decisions to afford the purchaser relief and indemnity, in a proper case, by giving him a lien upon the land, or rather, by permitting him to make use of his legal title to secure himself for the purchase-money paid before notice,” etc.

Wade, in his recent work on Notice, sec. 60, says: “It is not always necessary that the notice should be actually received before the execution and delivery of the conveyance. It will be sufficient if given before the payment of the purchase-money, and when there has been partial payment before notice received, the purchaser will be affected *pro tanto*.” *Hardin's Ex'rs v. Harrington*, 11 Bush, 367, is to the same effect.

The answer of the Reagans alleges that they received notice of the fraud practiced by Sylvester Johnson upon Had-

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ley long before the commencement of this suit, and that at the time there was \$2,000 of the purchase-money of the land unpaid, and that the notes in suit were given for a part of this unpaid purchase-money. These facts are not denied, but admitted, by their answer. It follows that the Reagans can not be regarded as innocent purchasers, and that, for that reason, the land must be held liable for the unpaid purchase-money due Hadley on his mortgage. If we adopt the rule as laid down by Wade, and held in *Hardin's Ex'rs v. Harrington, supra*, this would still be so as to the \$2,000 of purchase-money unpaid at the time the Reagans received notice of the fraud practiced upon Hadley by Johnson.

But does the fact that the land is liable for the amount due on the Hadley mortgage, with the other facts stated in the answer of the Reagans, constitute a defence to the present suit? That this mortgage constitutes a valid incumbrance on the land sold by Johnson to the Reagans, and for which the notes sued on were given, is true. But did the Reagans buy the land free from, or subject to, the incumbrance? If they purchased the land free from the incumbrance, then the consideration of the notes has failed, and the answer must be held good; if the purchase was subject to the incumbrance, then the consideration of the notes has not failed, and the answer must be held to be bad. This question must be determined by the conveyance executed by Johnson to the Reagans.

The deed is not in the record, nor is it alleged in the answer whether or not it contained a covenant against incumbrances, or any covenants at all. We can not presume that it did. It was for the appellees to show that they were not liable upon their notes. The notes, *prima facie*, established their liability. If there were no covenants in the deed by which Sylvester Johnson conveyed the land to the Reagans, and no fraud was practiced by Johnson upon them in the procurement of the notes, the Reagans must be deemed to

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have taken the land subject to the rights of Hadley. In the case of *Laughery v. McLean*, 14 Ind. 106, it is held that, in a suit on notes given for the purchase-money of land, an answer setting up a failure of title, without showing a breach of covenant or fraud, is bad on demurrer. The court say:

"The deed is not set out, nor is it averred in the answer that it contained any covenants of seizin, right to convey, or any other covenants whatever. If the deed contained any covenants that were broken, the original or a copy thereof should have been filed as the foundation of the defence." *Johnson v. Houghton*, 19 Ind. 359; Rawle Covenants, 3d ed., p. 614.

There is no averment in the answer that Johnson made any statement or representation to the Reagans, or either of them, as to his title to the land, or whether it was incumbered or not. Nor is it averred that he exhibited the release, which had been obtained from Hadley, to the Reagans. It does not appear that at the time they purchased of Johnson they knew that such release had been obtained, or that they in any way relied upon it. It is averred that, at the time the Reagans purchased, they knew nothing as to the fraud by which Johnson obtained the release. If they knew nothing about the release, they would not, of course, know anything about the means by which it had been procured. It is not shown by the answer that Johnson practiced any fraud upon the Reagans. We think, therefore, that their answer contains no defence, and that the demurrer to it should have been sustained. For the same, and the additional reason that Hadley has no interest in the controversy, we think his answer also bad.

The judgment below should be reversed.

PER CURIAM.—It is ordered that, upon the foregoing opinion, the judgment below be in all things reversed, at the costs of the appellees.

Holderbaugh v. Turpin.

No. 7741.

HOLDERBAUGH v. TURPIN.

DECEDENTS' ESTATES.—Contract.—Administrator.—Pleading.—Demurrer.

—Where a complaint alleges that an administrator contracted in his individual capacity, it will be held, upon demurrer, that the contract binds him individually, although it appears that the subject-matter of the contract grew out of matters connected with the estate represented by him.

SAME.—Consideration Accruing After Death of Intestate.—Where an administrator enters into a contract upon a consideration accruing subsequent to the death of his intestate, it is deemed his individual contract.

SAME.—Statute of Frauds.—A contract by an administrator, founded upon a consideration accruing after the death of his intestate, is not within the statute of frauds, although it may relate to, and be connected with, matters growing out of the administration of the estate.

STATUTE OF FRAUDS.—The mere passing of a new and independent consideration, from the promisee to the promisor, does not take the case out of the operation of the statute of frauds.

PRACTICE.—Objection to Evidence.—Appeal.—Where parol evidence is admitted on the trial, and no objection is there made, the question of its competency can not be presented on appeal.

SAME.—Demand.—Breach of Contract.—No demand is necessary where there is a complete breach of a promise to pay money, for the defendant is in default without a request.

From the Gibson Circuit Court.

J. E. McCullough and L. C. Embree, for appellant.

R. M. J. Miller, for appellee.

Elliott, J.—The appellant assigns as errors in this cause : “1st. The overruling of his demurrer to plaintiff’s complaint; 2d. The overruling of his motion for a new trial.”

The material allegations of the complaint, briefly stated, are, that the appellant, as administrator of the estate of Eliza Slaven, deceased, brought an action in the Gibson Circuit Court against the appellee, and that, while such action was pending, the parties agreed to submit the matters in controversy to three disinterested persons for decision and arbitration, and to continue the cause until the next term of court; that, if the award should be satisfactory to both parties, then

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each should pay one-half the costs, and the action should be dismissed ; but, if the award should not be satisfactory to both parties, then the party refusing to accept the award should pay the entire costs of the action up to that date ; that the matters in controversy were submitted to the arbitrators, who made an award, which the appellant refused to accept ; that the appellant afterwards prosecuted the action to final hearing, and obtained judgment against the appellee for all the costs of the action ; that the appellee has paid the costs, and that he has demanded repayment thereof from appellant, who refused to pay the same.

Appellant insists that the complaint is bad on demurrer for want of sufficient facts, because "it does not show that the appellant agreed to pay any costs out of his individual funds," and because the agreement, not being in writing, is within the statute of frauds.

The allegations of the complaint show a promise by the appellant. The demurrer confesses that the appellant made the promise sued upon ; he is, therefore, not now in a situation to successfully assert that the promise was made by him as administrator, and that he is liable only in his representative capacity. The mere fact that the matters submitted to arbitration grew out of an action prosecuted by the appellant as administrator, does not warrant the inference, as against the positive allegations of the complaint, that he bound himself only in the capacity of administrator. *Long v. Rodman*, 58 Ind. 58.

The appellant builds an elaborate argument upon the proposition that the contract sued on is within the statute of frauds. The promise, however, is declared upon as the original undertaking of the party against whom the action is prosecuted. The consideration for the appellant's promise was the agreement to submit the matters in controversy to arbitration, and this was a new consideration, altogether different and distinct from the liability of the estate which he

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represented. There was not merely a new and distinct consideration for the contract, but the contract is different and disconnected from any undertaking of the decedent, as well as from any liability of his estate. In *Hackleman v. Miller*, 4 Blackf. 322, it was held that, if a third person be induced to buy the note of a deceased person, by the promise of the administrator that it shall be paid, the promise is not within the statute of frauds, and within that ruling this case clearly falls. We do not, however, place our decision upon the ground that there was a valuable consideration for appellant's promise, but upon the ground that it was an independent and original contract. It is well settled that the statute does not apply to such contracts. *Anderson v. Spence*, 72 Ind. 315. When the contract was made, the estate represented by appellant was not liable for costs, and there was then no debt existing. Whether there was any subsequent default depended entirely upon the appellant himself. It was in his own power, at the time he made the contract, to create or prevent a default. The only default for which his contract made him liable was his own. He did not undertake to answer for the default of anybody else. If he had kept his promise, and abided the decision of the arbitrators agreed upon, there could have been no default for which he would have been answerable. The default which creates a liability against him in this action is his own. He agreed to abide by the decision of the arbitrators or pay the costs. He broke his contract, and it is this breach which constitutes the default for which this action seeks to make him answerable.

Appellant has pressed upon our consideration the cases of *Crosby v. Jeroloman*, 37 Ind. 264, and *Krutz v. Stewart*, 54 Ind. 178, and urges that the doctrine which they declare can not be reconciled with the reasoning in *Hackeaman v. Miller*. Counsel are right in asserting that the mere fact that there is a valuable consideration for the new promise is not sufficient to take the case out of the statute. We under-

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stand the doctrine, now generally recognized as correct, to be, that the mere passing of a new and independent consideration from the promisee to the promisor does not take the case out of the operation of the statute of frauds. *Berkshire v. Young*, 45 Ind. 461; *Crosby v. Jeroloman, supra*; *Krutz v. Stewart, supra*; *Hayes v. Burkam*, 51 Ind. 130; *Irwin v. Hubbard*, 49 Ind. 350; *Maule v. Bucknell*, 50 Pa. St. 39; *Chandler v. Davidson*, 6 Blackf. 367; *Kelsey v. Hibbs*, 13 Ohio St. 340; *Fullam v. Adams*, 37 Vt. 391. But we do not think that either the present case, or that of *Hackleman v. Miller*, rests entirely upon the ground that there was a new and valuable consideration for the promise relied upon as taking the case out of the statute. Of course, the fact that there was a new consideration is an important element, but it is not the controlling one.

It must be kept in mind that the subject-matter of the contract declared upon grows out of transactions which occurred after the decedent's death. The administrator's promise was not to pay some liability his decedent had incurred, nor to fulfil some engagement he had undertaken in his lifetime. In *Mills v. Kuykendall*, 2 Blackf. 47, it was said: "The whole case shows, that the object of the plaintiff was to charge the estate of the deceased, by obtaining a judgment against the administrators *de bonis intestati*. The promise of administrators, on a consideration originating subsequently to their intestate's death, can not sustain such an action." *Carter v. Thomas*, 3 Ind. 213; *Cornthwaite v. The First National Bank, etc.*, 57 Ind. 268. The undertaking of appellant was upon a consideration which accrued subsequent to the death of the intestate, and was to do a thing which the intestate's estate was not bound to do. It is impossible, in view of the authorities cited and the character of the undertaking itself, to regard it otherwise than as the promisor's original contract.

In discussing the questions presented by the motion for a

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new trial, counsel again insist that the evidence shows a contract within the statute of frauds, but what we have already said upon that subject disposes of the question, as well upon the evidence as upon the complaint.

It is urged that the evidence does not show that the appellant undertook otherwise than as administrator. It is conclusively shown that the consideration upon which he promised accrued subsequently to the death of his intestate, and the contract was therefore his individual one, to be enforced by a judgment *de bonis propriis*.

Counsel make a point upon the omission of the appellee to prove certain matters by the record. Parol evidence was suffered to be given without objection, and the appellant's complaint is entirely too late to be of avail. Such questions, as the one immediately under mention, must be made by proper objection in the trial court, reserved by exception, and presented in the motion for a new trial, or they can receive no consideration on appeal.

Lastly, counsel argue that no demand was proved. None was necessary. The appellant had agreed to pay the costs which appellee was compelled to pay, and there was a complete breach of his contract. A demand was not necessary to put the appellant in default; the breach of the contract did that.

Judgment affirmed.

75	88
124	573
75	86
136	494

No. 8138.

BENDER v. STEWART.

REAL ESTATE.—Tenants in Common.—Rents and Profits.—Tax Title.—Statute of Limitation.—Adverse Possession.—Where one tenant in common applied the rents and profits of the common property to the purchase of an outstanding tax certificate, and on such certificate procured a deed to himself, and by such deed claimed to be the owner of the in-

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terest of his co-tenant, or to have such color of title that he could invoke the protection of the statute of limitations applicable to tax sales, a demurrer to a paragraph of answer, pleading such statute, was correctly sustained.

SAME.—In such case, no adverse title was procured, but the purchase must be deemed to have been made for the benefit of both.

SAME.—*Partition.—Evidence.*—On trial of an action for partition, in such case, an answer that the plaintiff's claim of title was by deed, executed while the defendant was in adverse possession under a tax deed, is not sustained by evidence, that when plaintiff received his deed the premises were vacant, apparently not in possession of any one, the fences were down, the house vacant and doorless, and the defendant had removed from the State.

SAME.—*Tax Sale of Real Estate of Owners of Personal Property.*—Where, on the trial of such action, there was no recital in the tax deed, nor proof *aliunde*, that the owners of the land had not sufficient personal property to satisfy the taxes for which the land was sold, a good adverse title was not shown in the purchasing tenant.

From the Spencer Circuit Court.

G. L. Reinhard and J. S. Moore, for appellant.

C. L. Wedding, for appellee.

NEWCOMB, C.—This was an action for the partition of real estate, in which the appellee was plaintiff and the appellant was defendant. The complaint alleged that the plaintiff and defendant were tenants in common, in equal portions, of the real estate described; that the defendant, on the 28th day of February, 1873, purchased a tax certificate of the sale of said land for delinquent taxes, had February 7th, 1870; that at the time defendant purchased said certificate he had in his hands money for the rents and profits derived from said lands with which to pay said taxes, and all subsequent taxes, and that said land had been in the possession and use of the defendant for six years prior to the commencement of the action. Prayer for partition, for an accounting of rents and profits, and that the tax-title purchase should be set aside, and for all proper relief.

The defendant answered by a general denial, and two affirmative defences.

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The second paragraph averred that on February 28th, 1873, the defendant received from the auditor of Spencer county a tax deed for said land ; that he entered into possession under said deed, claiming title to the whole of said land by virtue thereof, and had held such possession continuously up to the commencement of said action ; that the plaintiff's only claim of title was by a deed executed to him by one Elijah Wilson ; and that, at the time of the execution of said last named deed, defendant was in the adverse and actual possession of said land under said tax deed ; wherefore the deed of said Wilson was champertous and void.

The third paragraph alleged that the defendant was the owner in fee simple of the land in controversy, and in the actual possession thereof ; that he held the same under a tax-title deed executed to him by the auditor of Spencer county, on February 28th, 1873 ; that the plaintiff's object in bringing suit was to set aside said tax title, and have the same declared void, and to redeem said land ; and that the plaintiff's cause of action did not accrue within five years before the commencement of the action.

A demurrer was sustained to the third paragraph of the answer, a reply in denial was filed to the second, and the cause was submitted to the court for trial. There was a finding for the plaintiff, followed by a judgment setting aside the tax deed, and for a sale of the land, it being admitted by the parties that it could not be divided without injury ; and declaring a lien in favor of the defendant for \$25, on account of taxes paid by him.

The appellant assigns for error the ruling of the circuit court in sustaining the demurrer to the third paragraph of his answer, and the overruling of his motion for a new trial.

We think there was no error in sustaining said demurrer. The complaint averred that when the defendant purchased the tax certificate, he had in his hands, of the rents and profits of the premises, more than enough money to pay

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therefor. This averment was not controverted or noticed in the third paragraph of the answer, and was therefore admitted. The case so made by the complaint and answer was this: One tenant in common applied the rents and profits of the common property to the purchase of an outstanding tax certificate, and on such certificate procured a deed to himself, and by such deed claimed to be the owner of the interest of his co-tenant, or at least to have such color of title that he could invoke the protection of the statute of limitations applicable to tax sales. It is clear that no adverse title could be procured in this manner. If the purchase was made, as charged, with joint funds, the defendant occupied such a trust relation to his co-tenant that the purchase must be deemed to have been made for the benefit of both. *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Rothwell v. Dewees*, 2 Black, 613; *Frentz v. Klotsch*, 28 Wis. 312.

A tenant in common in possession, or in the enjoyment of the rents and profits, can not, by permitting the lands to become delinquent, acquire his co-tenant's title by purchasing the same at a tax sale. Such purchase amounts only to a payment of the tax, or to a redemption from the sale if the tax certificate is purchased from a stranger. *Chickering v. Faile*, 38 Ill. 342; *McConnel v. Konepel*, 46 Ill. 519; *Page v. Webster*, 8 Mich. 263; *Dubois v. Campau*, 24 Mich. 360; *Lacey v. Davis*, 4 Mich. 140; *Butler v. Porter*, 13 Mich. 292; *Brown v. Hogle*, 30 Ill. 119; *Lloyd v. Lynch*, 28 Pa. St. 419; *Maul v. Rider*, 51 Pa. St. 377; *Downer's Adm'rs v. Smith*, 38 Vt. 464; Cooley Taxation, pp. 345-6-7. On the facts stated in the complaint, and not controverted by the answer demurred to, the defendant acquired neither title nor color of title by his purchase of the tax certificate, and the five-year statute of limitations was inapplicable.

The remaining question is, did the court err in overruling defendant's motion for a new trial? No questions of law were reserved at the trial, and the case is presented on the

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evidence as set out in the bill of exceptions. The facts, as shown by the evidence, may be thus summarized : James M. and Elijah B. Wilson were tenants in common of the land in controversy. On February 17th, 1872, the appellant purchased, at sheriff's sale, the share of James M. Wilson, and on February 19th, 1873, received a sheriff's deed therefor. In 1870 the land was sold for delinquent taxes, and was purchased by August Hermes, who afterward, but at what time does not appear, assigned his certificate of purchase to the appellant, and the latter procured a tax deed thereon from the auditor of Spencer county, February 28th, 1873. Appellant took possession of the land in 1873, soon after the execution of said two deeds, and continued in the actual possession and occupancy thereof until the autumn of 1878, when he removed to the State of Kentucky. At all times, after so taking possession, the appellant asserted title to all the land under said tax deed. The appellee purchased the interest of Elijah B. Wilson in said land on January 19th, 1879, and this action was commenced March 13th, 1879.

When the appellant removed to Kentucky, he left the key of the house upon the premises, with his son-in-law, who lived about one mile distant, and requested him to take charge and oversight of the land ; but there was no evidence that he did so, and, in fact, when the appellee received his deed from Wilson, the premises were vacant, and there were no evidences of possession by any one. The fences were down in many places, and the house was vacant and doorless. There was not, therefore, such adverse possession as to vitiate the deed from Wilson to the appellee.

There was no evidence to sustain the allegation of the complaint, that the appellant had received means from the rents and profits of the land to purchase the tax certificate ; but, as the answer of the statute of limitations was out of the record, this could not avail him, unless the tax deed conveyed to him a good title without the aid of the statute. This it

Nicklaus v. Burns et al.

did not do. Saying nothing of other apparent defects, there was no recital in the deed, nor proof *aliunde*, that the Wilsons had not sufficient personal property to satisfy the taxes for which the land was sold. *Ward v. Montgomery*, 57 Ind. 276; *Smith v. Kyler*, 74 Ind. 575. There are some cases which hold, and others which suggest, that where a tenant in common buys from a purchaser at a tax sale, after the time for redemption has expired, and there are no equitable circumstances making the purchaser a trustee for his co-tenant, or where the taxes, for which the land was sold, accrued before the ownership of the tenant, purchasing the tax-title, commenced, he may purchase for himself such title. *Lewis v. Robinson*, 10 Watts, 354; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Reinboth v. Zerbe Run Improvement Co.*, 29 Pa. St. 139; *Frentz v. Klotsch*, 28 Wis. 312; *Page v. Webster*, 8 Mich. 263; *Wright v. Sperry*, 21 Wis. 336. But we decide nothing on this point, as the record is not in a shape to properly present the question.

We find no error in the proceedings of the court below, and its judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 7495.

NICKLAUS v. BURNS ET AL.

75	93
141	122
141	691
143	486
75	93
144	470

PRACTICE.—Instructions not Applicable to Evidence.—Supreme Court.

It is error to give instructions which have no application to the evidence. When given, the Supreme Court can not say that such instructions did not tend to mislead and confuse the jury, to the injury of the losing party.

From the Jefferson Circuit Court.

Nicklaus v. Burns et al.

C. A. Korbly, for appellant.

E. G. Leland and H. Francisco, for appellees.

FRANKLIN, C.—This is an action brought by Nicklaus against appellees herein, wherein he seeks to have certain conveyances set aside, upon the ground that, at the time they were made, they were fraudulent and void as to the creditors of appellee Miles S. Burns. The complaint is in the ordinary form. An issue was formed by a denial, trial by jury, verdict and judgment for appellees.

Appellant has assigned for error the overruling of his motion for a new trial.

The facts in the case are about as follows: Appellee Miles S. Burns became indebted to appellant, and on the 27th day of October, 1869, executed his note for the same, in the sum of \$1,596.21, and a mortgage on certain property to secure the payment of the same; that on the 30th day of May, 1873, he obtained a judgment and foreclosure of the mortgage, for the sum of \$2,049.26; that the property was sold on the 19th day of July, 1873, for \$1,200, leaving a balance due thereon of over \$800; that on the 18th day of October, 1872, said Miles S. Burns executed a deed of conveyance in fee simple, "in consideration of one dollar and natural love and affection, and the consideration mentioned and recited" in the deed, to his daughters, Anna Johnson and Eliza J. Lilly, defendants, for two lots of real estate in the city of Madison, worth about \$3,000.

The *habendum* clause of this deed is as follows: "To have and to hold said above described real estate to the said Anna Johnson and the said Eliza J. Lilly, subject to the following restrictions: The said grantees and their husbands respectively, William R. Johnson, husband of the said Anna, and Christopher H. Lilly, agree and bind themselves to keep and respectably maintain the grantor, the said Miles S. Burns, during his natural life, and supply him with all the necessaries and comforts of life, that is, such as are in

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accordance with the present and former condition in society in which he moves ; and, to secure such maintenance, a lien is retained on said real estate ; and no partition between said heirs is to be made of said real estate, unless by the consent of this grantor.” That upon, and of the date of, said deed was the written endorsement of the said two daughters and their husbands, of the acceptance of said deed with the stipulations therein contained. And cotemporaneous therewith the said husbands executed a written agreement between themselves, by the terms of which they were both to live in the two-story brick house situated on one of the lots. And the said William R. Johnson agreed to attend to the renting of the property, paying the taxes, and apply the surplus to the maintenance of their said father-in-law, and they were jointly to make up any deficiency in his maintenance ; that, at the time of the execution of said deed and accompanying papers, the said Miles S. Burns, in addition to appellant’s said debt, owed the following sums : To Allen Blackford, \$1,200 ; William Stapp, \$500 ; William Hollis, \$300 ; Hawkins’ heirs, \$500 ; John McKinney, \$600 ; and was sued for damages by his partner in the sum of \$5,000. That in December, 1875, said Miles S. Burns intermarried with one Mildred Muse, who is now the appellee Mildred Burns ; that on the 5th day of January, 1876, in a few days after their marriage, he procured his two daughters, with their husbands, to convey the most valuable portion of said lots to said Mildred, for the consideration expressed in the deed, of \$3,000, and received from her \$1,100 in money ; the balance of said lots, worth about \$600, was conveyed to said Johnson and wife, and a home worth \$600 was purchased with a part of the \$1,100, and conveyed to said Lilly and wife ; and Burns, Sen., with his new wife, took possession of the old homestead ; but they only lived together seven or eight months, until they were divorced ; and from the case reported in *Burns v. Burns*, 60 Ind. 259, the record also

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of which is in this case, that was done without any separation. Before the commencement of this suit Burns had paid off all his indebtedness, except appellant's claim and \$300 to Hollis; and after the sale of the mortgaged property, the execution was returned *nulla bona*.

Appellant assigned various reasons in his motion for a new trial, all of which need not be copied in this opinion.

We see no error in the refusal of instructions asked by appellant. It is insisted that there was error in the giving of instructions 1 and 3, asked by appellees. These instructions read as follows:

"1st. If you believe from the evidence in the case that the defendants Anna Johnson and Jennie Lilly purchased the property in controversy in this action from Miles S. Burns, for a full, fair and valuable consideration, and without notice that the said Burns was seeking and intending thereby to cheat, hinder, delay and defraud his creditors out of their just demands existing at the time of said purchase, and you further find that they had paid the consideration, and received their deeds for said property before the fraudulent intent of said Burns to cheat, hinder and defraud his creditors had come to their knowledge, then, and in that case, said Anna Johnson and Jennie Lilly would be *bona fide* purchasers of the property so conveyed to them, and would be entitled to hold the same free from the claims of creditors of the said Miles S. Burns. And any person buying from them, under such circumstances, would be entitled to hold the property as against the world, and this, whether the second purchaser had a knowledge of the fraudulent intent of said Burns to cheat and defraud his creditors, in the original conveyance, or not.

"3d. If the jury believe from the evidence, that Anna Johnson, Jennie Lilly and Miles S. Burns conveyed any part of the property in controversy in this action to the defendant Mildred A. Burns, in consideration that said Mildred

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would marry the said Miles S. Burns, and you further find that said Mildred A. Burns did marry said Miles in consideration of the conveyance of said property to her, and that, at the time of such conveyance and marriage of the said parties, the said Mildred A. Burns had no knowledge of a fraudulent intent on the part of said Miles S. Burns thereby to cheat, hinder and defraud his creditors, then, and in that case, the said Mildred A. Burns would be a good-faith purchaser of any property so conveyed to her, and would be entitled to hold the same against the plaintiff in this action."

These instructions might be good enough law, if they had any application to this case. When the court attempts to apply the law to the facts in a case, it should confine the law to the facts that have been given in evidence, and not to an entirely different state of facts, about which there is no evidence whatever.

The evidence in this case does not tend, in the slightest, to prove that the daughters, or their husbands for them, purchased any part of the property from their father, or that anything whatever was paid by any person for the conveyance. Nor does the evidence in any way show that either of the daughters, or their husbands for them, had anything whatever to do with the sale of the property to their step-mother; they only executed the deed in pursuance of an arrangement their father had made with their step-mother. Nor is there a word anywhere to be found in the evidence, in relation to the consideration of the deed to Mrs. Burns being her marriage to Mr. Burns. The instructions might be applicable to some other case, but not to the one on trial.

After the evidence has been heard and argument of counsel had, for the court to instruct the jury upon a state of facts not embraced in the evidence, nor discussed by counsel, is asking them to decide questions which have not been submitted to them for trial. Jurors are liable enough to con-

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sider matters outside of the evidence, without being led off in that direction by instructions from the court. Such practice is well calculated to confuse and mislead the jury. *McMahon v. Flanders*, 64 Ind. 334; *Ferguson v. Hosier*, 58 Ind. 438; *Lewellen v. Garrett*, 58 Ind. 442; *Palmer v. Wright*, 58 Ind. 486; *Clem v. The State*, 31 Ind. 480; *Hays v. Hynds*, 28 Ind. 531; *Swank v. Nichols' Adm'r*, 24 Ind. 199; *Wallace v. Morgan*, 23 Ind. 399, 409.

These instructions, being inapplicable to the facts in the case, ought not to have been given; and we can not say they did not tend to mislead and confuse the jury, to the injury of appellant. A new trial should have been granted.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things, reversed, at the costs of the appellees; and that the cause be remanded, with instructions to grant a new trial.

No. 8268.

GALL ET AL. v. FRYBERGER.

MARRIED WOMAN.—*Judgment.—Collateral Attack.*—Where, in an action to foreclose a mortgage, it appears in the complaint that one of the defendants is a married woman, it is error to permit a personal judgment to be taken against her; but such judgment is not void, nor can it be collaterally attacked.

JUDGMENT.—*Debt not Due.*—A personal judgment rendered for a debt not due is clearly erroneous, but not absolutely void.

QUERY.—Whether it has not sufficient legal force to withstand collateral attack.

SHERIFF.—*Execution. When Justifies Levy.*—An execution addressed to a sheriff, in all respects regular, reciting a judgment recovered in a court of record having jurisdiction, justifies the sheriff in seizing the property of the judgment debtor subject to execution, for the purpose of satisfying the judgment and costs.

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SAME.—It is lawful for a sheriff to levy upon the personal property of a married woman by virtue of an execution, in all respects regular, issued upon a personal judgment rendered against her; and in an action by her against the sheriff, to replevy property so levied, where no demand is alleged or proved, and in the absence of any showing that the property was unlawfully detained by him, she can not recover.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellants.

MORRIS, C.—This is an action of replevin, brought by the appellants to recover a quantity of wheat, corn and flax, growing upon the land of the appellant Sarah E. Gall, alleged to have been wrongfully taken and levied upon by the appellee.

The appellee answered by general denial. The issue was submitted to the court for trial. Finding for the appellee. The appellants moved the court in writing for a new trial, on the ground that the evidence did not sustain the finding. The motion was overruled, and judgment for the appellee. The evidence is contained in a bill of exceptions.

The overruling of the motion for a new trial is assigned for error.

It appears from the evidence, that George Gall sold and conveyed eighty acres of land, situate in Hamilton county, to the appellant Sarah E. Gall; that she and her husband, Amos Gall, executed their five notes to said George Gall for a part of the purchase-money, and a mortgage on the land to secure the same; the notes and mortgage bear date April 1st, 1876, and amount to \$2,125; in September, 1879, a part of the notes having matured, George Gall commenced a suit in the Hamilton Circuit Court to foreclose the mortgage; the complaint was in the usual form, copies of all the notes and the mortgage being filed with and made part of it. It appeared from the complaint that Sarah E. Gall was a married woman at the time she executed the notes and mortgage; the appellants were duly served with process in the foreclosure suit; they made default, and the cause was submitted to the court for trial.

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The court found that there was then due George Gall, on the notes and mortgage, the sum of \$1,269.83; that there would become due to him \$651 April 1st, 1879, and the further sum of \$423 on the 1st day of April, 1880. The court also found that the mortgaged premises were not susceptible of division without injury to the parties in interest.

Upon this finding the court rendered judgment in favor of George Gall, against the appellants, for \$1,269.83, the sum then due; also, for the sum of \$651, to become due April 1st, 1879, and for the further sum of \$423, to become due April 1st, 1880. It was provided in the judgment, that if the last two sums were not paid or replevied when and as they became due, execution should issue therefor.

The court also decreed a foreclosure of the mortgage, providing in the decree that the proceeds of the mortgaged premises, which were ordered to be sold, should be applied to the payment of the costs, and the several sums adjudged to the plaintiff, in the order in which they should become due, and that the surplus, if any, should be paid to the said Sarah E. Gall. It also provided that in case of the payment of the \$1,269.83, found to be due, without sale of the mortgaged premises, then, upon the judgment for \$651 becoming due, said premises should be sold, as provided for its sale on the first sum found due, and the same provision was made as to the judgment for \$423. It was also provided that any balance that should remain unpaid after the sale of said mortgaged land should be levied generally of the property of the appellants, Sarah E. and Amos Gall.

A copy of this decree and order of sale was duly issued to the sheriff of said county, by virtue of which said mortgaged premises were duly sold to the said George Gall for \$1,336.94, the amount of the sum adjudged to be due him, and costs. This sale was made on the 25th day of January, 1879.

The second instalment of \$651, adjudged to become due April 1st, 1879, not having been paid, the said George Gall

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caused an execution to be issued on the judgment rendered therefor, which was delivered to the appellee, as sheriff of said county, by virtue of which he seized and levied upon the wheat, corn and flax described in the complaint of the appellant, growing upon the land embraced in the mortgage executed by the appellants to the said George Gall, and sold to him by the sheriff as above stated. The execution thus levied upon the growing crop of the appellant Sarah E., and of which she complains, was duly issued under the seal of the court, and directed to the appellee as sheriff of the county, commanding him, that of goods and chattels, land and tenements of the appellants, he cause to be made the sum of \$651, and interest and costs. It recited that, "Whereas George Gall recovered a judgment against Sarah E. Gall and Amos Gall on the 10th day of December, 1878, in the Hamilton Circuit Court, for \$651 and costs, with interest at six per cent. from the 1st day of April, 1879, and \$2.25 costs, accrued at this time, all without relief from appraisement laws." Then follows the command to levy the same, etc. The writ is dated June the 11th, 1879.

Upon these facts the appellants insist:

First. That the personal judgment in the foreclosure proceeding against Sarah E. Gall, a married woman, is void;

Secondly. That, in a suit to foreclose a mortgage against a married woman, no judgment can be rendered against her so as in any way to affect her separate property not embraced in the mortgage;

Thirdly. That in a foreclosure suit, no judgment can be rendered for an instalment of the debt, secured by the mortgage, not then due.

It may be admitted, that where it appears upon the face of the complaint, as it did in the foreclosure suit involved in this case, that one of the defendants is a married woman, it is error to take a personal judgment against her. But such a judgment is not void, nor can it be questioned in col-

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lateral proceedings, as it is sought to be done in this case—*Emmett v. Yandes*, 60 Ind. 548; *Hinsey v. Feeley*, 62 Ind. 85. The error in the foreclosure proceedings, if there is any, may be corrected by proceedings to revise the same.

It was held in the case of *Allen v. Parker*, 11 Ind. 504, that a judgment in a foreclosure suit, where several instalments were secured by the mortgage, sought to be foreclosed, for the amount of the notes due and to become due, was not erroneous if otherwise in conformity to law. But this case is overruled by the subsequent case of *Skelton v. Ward*, 51 Ind. 46. In this case it is held that no personal judgment can be rendered in a suit to foreclose a mortgage for instalments not due at the time the judgment is rendered. The court says: “We can not regard the judgment in question, so far as it relates to the instalments or notes not due at the time the judgment was rendered, as a judgment on which an execution can legally issue to be made of the property generally of the judgment defendant.” Again, the court says: “A personal judgment can not legally be rendered for a debt which is not due.”

We apprehend that a judgment rendered for a debt not due is not void. It is clearly erroneous, but, until reversed or set aside, it has sufficient legal force to withstand all collateral attacks. If so, it would not be subject to the objections urged by the appellants. It is not, however, necessary to discuss or decide this question, as the judgment must be affirmed on other grounds.

The appellee, as sheriff of Hamilton county, by virtue of an execution addressed to him as such sheriff, in all respects regular, reciting a judgment for a certain sum, recovered in a court having jurisdiction, levied upon and held the property in dispute. The writ, by virtue of which he held the property, disclosed none of the defects insisted upon by the appellants. It was in every respect regular, and recited a valid judgment. It justified the sheriff in seizing the prop-

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erty of the appellants, subject to execution, for the purpose of satisfying the judgment and costs. It was enough that the execution purported to be issued upon a judgment which the court had jurisdiction to render. It was no part of his duty to look beyond the face of the writ. *Davis v. Bush*, 4 Blackf. 330; *Caldwell v. Kenworthy*, 31 Ind. 238; *Holmes v. Nuncaster*, 12 Johns. 395; *Savacool v. Boughton*, 5 Wend. 170; *Deyo v. Van Valkenburgh*, 5 Hill, 242.

The levy made by the appellee upon the growing crop described in the appellants' complaint was lawful, as was his subsequent possession of it. No demand of the crop is alleged or proved; nor is it shown that the property was unlawfully detained by the appellee.

The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 7035.

KNOWLTON v. THE SCHOOL CITY OF LOGANSPORT.

PLEADING.—*Complaint.*—*Conversion.*—*Demand.*—An averment of a demand, if otherwise necessary, is not required if a conversion is alleged in the complaint.

SAME.—*Answer of Payment to Another for Plaintiff's Use.*—*Cities and Towns.*—In an action by a school city against one who had been president of its board of school trustees, for conversion of money collected by him for plaintiff, an answer that he paid it over to another, who had been trustee and treasurer of such board, but with himself legislated out of office, and who is a responsible resident of the city, and ready to account and settle with plaintiff, is insufficient on demurrer.

CONVERSION.—*Ratification of Act by Suit.*—*Payment to Another.*—*Demand.*—In an action for conversion, the plaintiff, by suing, ratifies the defendant's act in making a collection of money for plaintiff; but the ratifi-

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cation does not confirm his act in turning it over to another. In legal contemplation, his delivery of the money to one having no authority from the plaintiff to receive it is a conversion, and makes him liable to an action without demand.

SAME.—*Recoupment.—Expenses of Collection.—Time Employed.—Ratification by Suing Limited.*—In such action, where it appears that the defendant made the collection without authority, an answer claiming for expenses of collection shows no ground for recoupment. The ratification implied by suing extends only to the act of collection, and does not embrace the time employed or expenses incurred before or after the collection.

AGENCY.—“*Receiving*” and “*Paying Out*.”—*Authority not Implied.*—Receiving and paying out are two things, and the authority of an agent to do the one by no means implies the power or right to do the other.

From the Cass Superior Court.

M. Winfield and Q. A. Myers, for appellant.

D. B. McConnell, for appellee.

Woods, J.—Complaint in two paragraphs by the appellee against appellants, in substance as follows:

First. That heretofore, to wit, on the first day of September, 1875, the defendant unlawfully and fraudulently collected and received of and from the “Republic Insurance Company,” of Chicago, Illinois, through and by her legally appointed and qualified receiver, the sum of five hundred and eighty dollars, belonging to the plaintiff, upon the false and fraudulent representation then and there made by him to said receiver, that he was the agent of the plaintiff for the receipt and collection of said money; that the defendant concealed from the plaintiff the fact that he had collected and received said money, and has converted the same to his own use, and withholds the same from the plaintiff, etc.

Second. That the defendant is indebted to the plaintiff in the sum of six hundred dollars, money belonging to the plaintiff and due her from the “Republic Insurance Company,” of Chicago, Illinois, of which the defendant, sometime in the year 1875, unlawfully, fraudulently and without authority, obtained possession, and, without the knowledge

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or consent of the plaintiff, corruptly converted the same to his own use, etc.

A demurrer to each paragraph of the complaint, for want of facts sufficient to constitute a cause of action, was overruled, and an exception to the ruling duly saved. The defendant filed an answer, consisting of a general denial and seven special paragraphs, to the fourth, sixth, seventh and eighth of which demurrs were sustained ; and exceptions to these rulings were also saved. But counsel for the appellant have confined their argument to the sixth and seventh paragraphs, which are, in substance, as follows :

6th. That when said claim accrued, the defendant was the president of the board of trustees of the plaintiff's corporation, and that William Dolan, another member, was treasurer ; that, while the board was thus organized, by authority of the board this defendant instituted proceedings in Chicago to collect said claim, and employed an attorney ; that afterward, by an act of the Legislature of the State, the defendant and said Dolan were legislated out of office, and an entire new set of school trustees were elected ; that pending the settlement between the treasurer, Dolan, and the new trustees, composing the plaintiff, and before all matters had been settled between them, this defendant collected said money and paid over the same to William Dolan, the treasurer of the old board, to be by him accounted for to the plaintiff, before any demand was made upon the defendant for the money ; that the defendant informed the plaintiff, before the commencement of this suit, that he had paid over all of said money to said Dolan, who still has the same, and who was and still is a resident of said city of Logansport, and was and still is amply responsible, and ready to account for said money to the plaintiff ; that when he collected said money he was not trustee, but that there were complications about the matter known only to himself, and, in the interest and for the benefit of the plaintiff, he made

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the collection and at once paid the money over to the said Dolan, who, as treasurer, as before stated, had an unsettled account with the plaintiff, with the request that he, Dolan, at once account to the plaintiff for said money, in his settlement; and the defendant denies that he acted fraudulently, but says that he acted in good faith, and never converted said money or any part thereof to his own use; but said Dolan holds said money, and is ready and willing, as he is informed, to settle with the plaintiff.

7th. By way of recoupment, the defendant says that he admits the collection of the money, except that he denies the fraud charged; but that his legitimate, lawful and necessary expenses in collecting were seventy-five dollars, as follows: Railroad fare to Chicago, ten dollars; hotel bills in Chicago, fifteen dollars; paid attorney in Chicago employed by plaintiff to collect said money, fifty dollars; all which expenses were necessary and unavoidable.

The only objection urged against the complaint is, that there is no averment of a demand made upon the defendant before the bringing of the suit; but there is nothing in this objection, because each paragraph of the complaint contains a distinct averment that the defendant had converted the money sued for to his own use. The rule is familiar, that an averment of a demand, if otherwise necessary, is not required if a conversion is alleged.

There was no error in sustaining the demurrer to the answers. The denial in the sixth paragraph of the alleged conversion amounted to no more than the general denial, and the other averments in that answer were clearly insufficient to show a defence to the action. It is true, as counsel for the appellant contend, that, by suing the appellant for the money, the plaintiff ratified his act in making the collection, but the ratification goes no further. It does not confirm his turning the money over to Dolan, who had ceased to be the treasurer of the plaintiff, any more than it would be a justi-

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fication for any other disposition which the defendant might have chosen to make of it ; as, for instance, giving it to a stranger, burning or throwing it away. In legal contemplation, his delivery of the money to Dolan, who had no authority from the plaintiff to receive it, was a conversion by the defendant, and made him liable to an immediate action by the plaintiff without demand, even if otherwise a demand had been necessary.

The seventh answer shows no ground for recoupment. The defendant made the collection without authority. The ratification of his act, which is implied from the bringing of the suit, extends only to the act of collection, but does not embrace either time employed or expenses incurred before or after the collection. The plaintiff had a right to choose her own agencies, and to provide as best she might against the incurring of unnecessary expense incident to the collection ; and the law does not encourage such unsolicited intrusion as was that of the defendant, by declaring that an acceptance and ratification of his act shall entitle him to claim anything for services, or expenses, such as are claimed in this case. Having obtained money which belonged to the plaintiff, the plaintiff was entitled to claim of him the whole sum which he received, undiminished by his railroad fares or hotel bills ; and he had no right, after receiving it, to pay out the money or part thereof, to attorneys, or to any others, who had, or claimed to have, demands against the plaintiffs. Receiving and paying out are two things, and the authority to do one by no means implies the power or right to do the other.

The judgment is affirmed, with costs.

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No. 7319.

HAYDEN, ADMINISTRATOR, v. RETCHER.

PARTNERSHIP.—Promissory Note.—Firm Indebtedness.—When a partnership is dissolved, and the partner remaining in business assumes and agrees, upon a sufficient consideration, to pay all debts of the firm, such partner has no authority after the dissolution to borrow money and sign the name of the late firm to a note for the purpose of getting money to pay the firm indebtedness.

SAME.—Note Executed by Partner in Firm Name, after Dissolution of Firm, Not Binding on Retiring Partner.—Special Finding.—In an action upon a note executed by a partner in the firm name, after the dissolution of the partnership, and for money borrowed by such partner, without the authority or consent of the retiring partner, against him, the court found specially that the plaintiff, the payee of the note, did not part with his money upon the credit of the firm, or upon the credit of the retiring partner, the defendant; that the money was delivered some time before the note was executed, and that the payee never knew that the defendant or his name was to be in any way connected with the note until the note was delivered to him, and that he knew that the firm had been dissolved.

Held, that the money thus borrowed was the individual debt of the partner who borrowed it and executed the note therefor, and not the debt of the defendant, and the note in suit not his note.

Held, also, that the fact that the money borrowed was used in payment of the firm's debts does not render the defendant liable for any part of such money, or upon the note given therefor.

PRACTICE.—Weight of Evidence.—Supreme Court.—The Supreme Court will not disturb the verdict of a jury, or the finding of a court, upon the mere weight of evidence.

From the Kosciusko Circuit Court.

C. Clemans and A. C. Clemans, for appellant.

L. H. Haymond and L. W. Royse, for appellee.

Howk, C. J.—On the 14th day of September, 1877, David Hayden, then in full life, but since deceased, commenced this action against one Moses Rush and the appellee, Thomas Cretcher, as defendants. Hayden's complaint contained three paragraphs, the first two of which counted upon a promissory note for \$150, dated February 22d, 1873, alleged to have been executed by the said Rush and Cretcher, as part-

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ners, by the name of M. Rush & Cretcher, and payable one day after date to said David Hayden. The third paragraph counted upon an open account for \$150, as money loaned by Hayden to said Rush & Cretcher, and as money had and received by them for said Hayden's use, on said 22d day of February, 1873.

The defendant Rush made default. The appellee, Cretcher, answered by a general denial, and by a denial under oath of the execution of the note in suit.

Upon the trial of the cause, the court made a special finding of the facts and of its conclusions of law thereon, in substance as follows :

“The court finds the facts in this cause to be as follows, to wit :

“1st. In November, A. D. 1871, Moses Rush and Thomas Cretcher were partners, doing business together in the town of Pierceton, Indiana, and as such became indebted to various parties in various sums, amounting in the aggregate to about \$2,500 ; and, among other persons, the said firm owed A. D. Brandreth & Co. about \$500, which debts were all due, or about due, on the 1st day of November, A. D. 1872.

“2d. In November, 1872, the said parties dissolved partnership. Thomas Cretcher sold out his interest in the firm and its assets to his co-partner, Moses Rush, and Rush took all the partnership property and assets, and agreed with his co-partner, at the time of such dissolution, in consideration thereof and of the agreement then made between them, to pay all the partnership debts of said firm, among them the debt of said Brandreth & Co. ; and there were then turned over to said Rush by the firm assets sufficient wherewith to pay all the said debts of said firm, and fourteen hundred dollars in assets over and above such debts.

“3d. The said Rush then formed a co-partnership, in the same line of business before carried on by Rush & Cretcher, with one Matchett, and at the time of the execution of the

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note sued on was, with said Matchett, carrying on said business, of which plaintiff had knowledge.

“4th. No formal notice of dissolution was ever given by Rush & Cretcher, or either of them, to the creditors of the firm, or to any of the firm creditors.

“5th. At the time of such dissolution, the firm was not indebted to the plaintiff.

“6th. About a week before the 22d day of February, 1873, Moses Rush concluded a negotiation with plaintiff for a loan of \$300 in cash. Rush commenced this negotiation after he and Cretcher had dissolved partnership. He wanted the money to pay to Brandreth & Co. Cretcher knew Rush was trying to make the loan from the plaintiff, and that he was intending to use the money, if he obtained it, with which to pay Brandreth & Co., but did not know Rush was seeking to give the note of the firm for any part of such loan, or was intending or seeking to pledge the credit of the firm.

“7th. The plaintiff delivered over to the said Moses Rush \$300, the amount of said loan, about one week before the note sued on was executed. At that time plaintiff and Rush had not arranged that the name of the defendant, Cretcher, was to be signed to any note given for this money, or any part of it. Plaintiff parted with his money, not upon the credit of the firm of Rush & Cretcher, or upon the credit of Cretcher, as to the whole or any part of such loan.

“8th. At the time the note sued on was executed, it was given for \$150 of the money so borrowed. The first knowledge plaintiff had that Cretcher or his name was to be in any way connected with the note sued upon, or with said loan, was when the note was signed, on the day of its date, and passed over to him by Rush. When he received said note, he said to Rush that the firm of Rush & Cretcher was dissolved, and that he did not think Rush had a right to sign Cretcher’s name to the note, that Rush, by so signing, might get into trouble; Rush replied that it was all right, that this

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was an old partnership matter, and he had a right to so sign the note ; that it would be received by John O. Cretcher, and plaintiff would have no trouble about it. Plaintiff then received the note sued on. At this time Rush had fair credit, was in business, and generally supposed to be in fair financial circumstances. In August, 1875, Rush failed in business, and is now insolvent, and was insolvent in August, 1875.

“9th. Cretcher knew that Rush had received the money for which the note was given, from Hayden, and knew that it was applied to the payment of the Brandreth & Co. debt, but did not know that his, Cretcher’s, name was signed to the note, nor did he know that the money for which said note was given was in whole or in part procured on the credit of Rush & Cretcher jointly, or as to any part on the credit of his, Cretcher’s, name. As soon as Cretcher ascertained his name was upon the note sued on, he called upon the plaintiff and informed him that the signature was not his, and was without his authority or consent.

“10th. The defendant Thomas Cretcher never authorized Moses Rush to sign his name to the note sued on, nor consented to the same.

“11th. The only transaction between the plaintiff and the defendants is the one in these special findings set out.

“And the court, as conclusions of law, finds from the foregoing facts, that the note sued on is not the note of Thomas Cretcher, and that he is not legally liable to pay any part thereof. (Signed) ELISHA V. LONG, Judge.”

To the special findings of the court and its conclusions of law thereon, the plaintiff below excepted, and moved the court for a joint judgment against both defendants, on the special findings, as to the note, for the sum of \$174 ; which motion was overruled by the court, and to this ruling he excepted. Judgment was rendered against the plaintiff below for the appellee’s costs, and from this judgment this appeal is prosecuted by the plaintiff’s administrator.

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The appellant has assigned errors, as follows:

1. The court erred in its conclusions of law upon the facts specially found;
2. The court erred in overruling the plaintiff's motion for a judgment upon the special findings, for \$ — ;
3. The court erred in overruling the plaintiff's motion for judgment upon the special findings, and the third paragraph of his complaint; and,
4. The court erred in overruling the plaintiff's motion for a new trial.

It is claimed by the appellant's counsel, in argument, that the court erred in its conclusions of law upon the facts specially found, because the court found, as a fact, that the money borrowed from the plaintiff by the defendant Rush, on his own credit, and for which he subsequently executed the note in suit, was applied by him to the payment, in part, of the debt of the old firm of Rush & Cretcher to A. D. Brandreth & Co. It is very clear, we think, that this position of counsel can not be maintained. When the firm of Rush & Cretcher was dissolved, the court found that the defendant Rush, upon a sufficient consideration, assumed the payment of the entire indebtedness of the firm, including the debt to Brandreth & Co. As between Rush and the appellee, the firm indebtedness became, in legal effect, the individual indebtedness of Rush, and not of the appellee; and, while the latter was by no means discharged from his liability to the creditors of the firm by the contract of dissolution, yet, as between themselves, the appellee had the right to insist that Rush should pay the debts of the late firm out of his own proper means. After the dissolution of the partnership, Rush had no power or authority to contract new debts in the name, or upon the credit, of the late firm, even for the purpose of getting money to be applied in payment of the firm indebtedness, which he had assumed to pay. The court found as facts, that the plaintiff parted

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with his money, not upon the credit of the late firm of Rush & Cretcher, nor upon the credit of the appellee, Cretcher, as to the whole or any part of such loan ; that the plaintiff delivered the money to Moses Rush about a week before the note in suit was executed ; that the plaintiff never knew that Cretcher, or his name, was to be in any way connected with the note until it was signed and delivered to him by Moses Rush ; and that the plaintiff then told Rush that the firm of Rush & Cretcher was dissolved, and he did not think Rush had a right to sign Cretcher's name to the note in suit.

Upon these facts, we are clearly of the opinion that the money borrowed from the plaintiff was the individual debt of Moses Rush, and not the debt of the appellee, and that the note in suit was not the appellee's note. The fact, that the money borrowed was used by Rush in payment of the old firm's indebtedness to Brandreth & Co., certainly did not render the appellee liable to the plaintiff for the whole or any part of such money, or upon the note given therefor by Rush, long after the dissolution of the partnership, and without the authority or consent, express or implied, of the appellee. The court did not err in its conclusions of law upon the facts specially found, nor in overruling the plaintiff's motions for judgment thereon. *King v. Barbour*, 70 Ind. 35, on page 40.

In the plaintiff's motion for a new trial, several causes were assigned therefor ; but of these we need only notice the first three causes, as follows :

1. The finding and decision of the court were not sustained by any sufficient evidence ;
2. The finding was contrary to the evidence ; and,
3. The finding and decision were contrary to law.

We have read the evidence as it appears in the record. It consists chiefly of the testimony of the parties to the suit, at the time of the trial in the lower court. It was conflict-

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The appellant has assigned errors, as follows:

1. The court erred in its conclusions of law upon the facts specially found;
2. The court erred in overruling the plaintiff's motion for a judgment upon the special findings, for \$ — ;
3. The court erred in overruling the plaintiff's motion for judgment upon the special findings, and the third paragraph of his complaint; and,
4. The court erred in overruling the plaintiff's motion for a new trial.

It is claimed by the appellant's counsel, in argument, that the court erred in its conclusions of law upon the facts specially found, because the court found, as a fact, that the money borrowed from the plaintiff by the defendant Rush, on his own credit, and for which he subsequently executed the note in suit, was applied by him to the payment, in part, of the debt of the old firm of Rush & Cretcher to A. D. Brandreth & Co. It is very clear, we think, that this position of counsel can not be maintained. When the firm of Rush & Cretcher was dissolved, the court found that the defendant Rush, upon a sufficient consideration, assumed the payment of the entire indebtedness of the firm, including the debt to Brandreth & Co. As between Rush and the appellee, the firm indebtedness became, in legal effect, the individual indebtedness of Rush, and not of the appellee; and, while the latter was by no means discharged from his liability to the creditors of the firm by the contract of dissolution, yet, as between themselves, the appellee had the right to insist that Rush should pay the debts of the late firm out of his own proper means. After the dissolution of the partnership, Rush had no power or authority to contract new debts in the name, or upon the credit, of the late firm, even for the purpose of getting money to be applied in payment of the firm indebtedness, which he had assumed to pay. The court found as facts, that the plaintiff parted

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with his money, not upon the credit of the late firm of Rush & Cretcher, nor upon the credit of the appellee, Cretcher, as to the whole or any part of such loan ; that the plaintiff delivered the money to Moses Rush about a week before the note in suit was executed ; that the plaintiff never knew that Cretcher, or his name, was to be in any way connected with the note until it was signed and delivered to him by Moses Rush ; and that the plaintiff then told Rush that the firm of Rush & Cretcher was dissolved, and he did not think Rush had a right to sign Cretcher's name to the note in suit.

Upon these facts, we are clearly of the opinion that the money borrowed from the plaintiff was the individual debt of Moses Rush, and not the debt of the appellee, and that the note in suit was not the appellee's note. The fact, that the money borrowed was used by Rush in payment of the old firm's indebtedness to Brandreth & Co., certainly did not render the appellee liable to the plaintiff for the whole or any part of such money, or upon the note given therefor by Rush, long after the dissolution of the partnership, and without the authority or consent, express or implied, of the appellee. The court did not err in its conclusions of law upon the facts specially found, nor in overruling the plaintiff's motions for judgment thereon. *King v. Barbour*, 70 Ind. 35, on page 40.

In the plaintiff's motion for a new trial, several causes were assigned therefor ; but of these we need only notice the first three causes, as follows :

1. The finding and decision of the court were not sustained by any sufficient evidence ;
2. The finding was contrary to the evidence ; and,
3. The finding and decision were contrary to law.

We have read the evidence as it appears in the record. It consists chiefly of the testimony of the parties to the suit, at the time of the trial in the lower court. It was conflict-

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ing, and, as it is stated in the bill of exceptions, it is not very satisfactory. We can not say, however, that the evidence in the record does not tend to sustain the special findings of the court on every material point. It is not the province of this court to weigh the evidence and determine its preponderance. For this purpose, the learned judge who tried the cause had opportunities and facilities, which we can not have, for determining the credibility and value of the evidence, and it is for this reason it has been so often decided that this court will not disturb the verdict of a jury, or the finding of a trial court, upon the weight of the evidence. *Cox v. The State*, 49 Ind. 568; *Rudolph v. Lane*, 57 Ind. 115; *The Fort Wayne, etc., R. R. Co. v. Hesselman*, 65 Ind. 73. In the case now before us, the evidence tended to sustain the special findings, and certainly they were not contrary to law. The motion for a new trial was correctly overruled.

The judgment is affirmed, at the costs of appellant, to be levied of the estate of his decedent in his hands to be administered.

No. 7612.

CLARK v. STIPP ET AL.

REPLEVIN.—*Trespassing Animals.*—*Enclosed Land.*—*Lawful Fence.*—An action of replevin will lie to recover cattle seized and held for the payment of damages done by them to crops upon enclosed land, if the fence through which they broke was not a lawful fence.

SAME.—*Evidence.*—*Supreme Court.*—If, in such case, the evidence is conflicting as to whether it was a lawful fence, and the lower court finds for the plaintiff, the Supreme Court will regard the fact established, that the fence was not a lawful fence, within the meaning of sections 1 and 2, 1 R. S. 1876, p. 495.

SAME.—*Practice.*—*Remedy.*—If the fence is not a lawful one, the taker-up has no right to detain such cattle, and the owner can not be deprived of any remedy he may have, simply because the taker-up claims them as trespassing animals.

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SAME.—*Act of 1877 Construed.—Board of Commissioners.*—The act of March 12th, 1877, Acts 1877, Spec. Sess., p. 42, authorizes an action to be maintained against the owner of all trespassing animals, whether the fence is a lawful one or not, unless the animals are authorized to run at large by an order of the board of commissioners, in which case the fence must be lawful to maintain the action.

SAME.—In such case, it is immaterial whether the order was passed before or after the said act of 1877 took effect.

From the Pulaski Circuit Court.

W. Spangler, for appellant.

J. C. Nye and N. L. Agnew, for appellees.

BEST, C.—In August, 1877, the appellees' cattle trespassed upon the enclosed lands of appellant, damaged his crops, and were seized and held by him for the payment of his damages. Upon his refusal to deliver them until his damages were paid, the appellee replevied them before a justice of the peace, where he succeeded. On appeal the cause was submitted to the court and a judgment rendered for the appellees.

The only disputed question of fact, upon the trial, was whether the fence through which the cattle broke was a "lawful fence." The evidence was very conflicting, and, under these circumstances, this court can not disturb the finding of the trial court, but must regard the fact as established that the fence was not a "lawful fence," within the meaning of sections 1 and 2 of an act "concerning inclosures, trespassing animals, and partition fences." 1 R. S. 1876, p. 495.

Thus regarded, the appellant insists that the judgment is erroneous, for the following reasons, viz. :

1st. The remedy provided by the above act is exclusive where a trespassing animal is taken and held for the payment of damages under said act.

2d. The act of March 12th, 1877, authorizes the detention of such property, whether the fence is "lawful" or not, as the latter part of it, which recognizes the power of the county commissioners to specify what animals may run at large, is unconstitutional.

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3d. If such law is valid, there was no proof that the commissioners had made any order after such act went into force.

We do not think the remedy mentioned in the statute is exclusive ; unless the fence is a "lawful" one, the taker-up has no right to detain such cattle as may be trespassing upon his land, and we do not think that where cattle are detained without right the owner can be deprived of any remedy he would otherwise have for their recovery, simply because the taker-up claims them as trespassing cattle. This was so held in *Blizzard v. Walker*, 32 Ind. 437, and we see no good reason for holding otherwise.

The act of March 12th, 1877, amends section 2 of the above recited act, and is as follows : "If any domestic animal break into an enclosure or wander upon the lands of another, the person injured thereby shall recover the amount of damage done : *Provided*, That in townships where, by order of the board of county commissioners, said domestic animals are permitted to run at large, it shall appear that the fence, through which said animal broke, was lawful ; but where such animal is not permitted to graze upon the uninclosed commons, it shall not be necessary to allege or prove the existence of a lawful fence in order to recover for the damage done."

"At common law, the owner of animals is obliged to keep them upon his own grounds, and is a wrong-doer if he suffer them to stray upon the grounds of others. This, as a general rule, is the law of Indiana." *The Pittsburgh, etc., R. W. Co. v. Stuart*, 71 Ind. 500.

Although, by the common law, it is wrongful to permit domestic animals to stray upon the lands of another, yet the Legislature, by section 2, amended as above, provided that no action should be maintained for such injury, unless it appeared that such animal broke through a lawful fence. Any remedy for the wrong was withheld. This it was competent for the Legislature to do, as was decided in *Myers v. Dodd*, 9 Ind. 290.

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The only change made by the amendment of 1877, was to allow a remedy for such trespasses as are committed upon uninclosed lands by animals not permitted to run at large by an order of the board of county commissioners. For trespasses, caused by such animals as are allowed to run at large, the law is not changed, but remains the same. The remedy is withheld, unless the fence is "lawful." This amendment gives a remedy where there was none, but does not take away any; nor does it authorize the board of commissioners to make such orders as are mentioned therein. It simply recognizes the fact that such orders may have been made, and provides that for trespasses committed by animals at large, in pursuance of them, the law shall remain as it was. If the Legislature could withhold a remedy for trespasses committed by *all* domestic animals, under certain circumstances, it could, under like circumstances, withhold it for those committed by animals at large, in pursuance of such orders. The act specifies a part of the animals, the owners of which are not liable, unless the fence is lawful. That part might have been otherwise designated. However done, it would be a mere division of the whole number running at large, and, therefore, it seems to us that the validity of the law authorizing the board of commissioners to make such orders is not involved, and since it appears that the animals in question were at large in pursuance of an order of the board of commissioners, it was material to know whether the fence through which they broke was "lawful."

Nor do we think the third point well taken. The act of March 12th, 1877, applies to trespasses of animals permitted to run at large by all orders of the board of commissioners, whether such orders were made before or after such act took effect.

For these reasons we think the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things, affirmed, at the costs of the appellant.

Jackson School Township v. Farlow.

No. 7516.

JACKSON SCHOOL TOWNSHIP v. FARLOW.

SCHOOL LAW.—Contract with Unlicensed Teacher to Teach School.—A teacher can neither recover compensation for services rendered under a contract with the officers of a public school corporation, nor damages for a breach of such contract, unless he has been licensed to teach as prescribed by the statute.

SAME.—License.—Pleading.—Complaint.—In an action by a teacher upon a contract entered into by him with a township trustee, the complaint must allege that he had obtained the requisite license; and an averment that he was "prepared and qualified in every particular to perform all the conditions of the contract" is not equivalent to such an allegation.

SAME.—License not Condition of Contract.—The requirement that public teachers shall obtain a license is not a condition of the contract, but is a command of the law.

SAME.—Contract.—Descriptio Personæ.—Estoppel.—In the introductory clause of a contract to teach school, the contracting parties were described as "M. P., trustee of J. township, and J. F., a licensed teacher." Held, in an action on the contract by the teacher, that the words annexed to his name are not only used by way of recital, but are merely *descriptio personæ*, and are not in the form of a stipulation, and did not estop the township trustee from asserting that the plaintiff did not have the requisite license.

SAME.—Township Trustee.—A township trustee can not, by inserting a provision by way of recital in a contract, nullify the provisions of the statute.

PLEADING.—Recitals.—Exhibits.—Contract.—As a rule, matters can not be pleaded by way of recital, and a mere recital in a contract can not supply the place of positive averment; but where a recital is used as signifying a stipulation, condition or promise, a pleading may be aided by the recital in an exhibit, though it can not where the matters are introductory and stated strictly by way of recital.

SAME.—Pleader must State Facts, not Conclusions of Law.—A pleader who seeks to bring himself within a statute must state, not in the form of a conclusion of law, but as a traversable fact, the act done by him and relied upon as bringing him within the statute.

CONTRACT.—Descriptive Words.—Signature.—Descriptive words can not control, much less give validity to, a contract, and it makes no difference whether the descriptive words are simply appended to the signature at the foot of the contract, or annexed to the name in the body of the instrument.

From the Madison Circuit Court.

Jackson School Township *v.* Farlow.

C. L. Henry and W. S. Diven, for appellant.

H. D. Thompson, for appellee.

ELLIOTT, J.—Appellee, plaintiff below, brought this action upon a contract entered into by him with the trustee of Jackson township, wherein he undertook to teach one of the public schools of said township for a specified time and for a fixed compensation. The complaint alleges a breach of this contract, and demands damages.

Appellant contends that the first paragraph of the complaint is bad, and that the court erred in overruling the demurrer addressed to it. The objection stated is, that it does not show that appellee had obtained a license, as required by section 28 of the school law. It is settled that a teacher can neither recover compensation for services rendered under a contract with the officers of the public school corporations, nor damages for a breach of such a contract, unless he has been licensed to teach as prescribed by the statute. *Putnam v. The School Town of Irvington*, 69 Ind. 80; *Harrison Township v. Conrad*, 26 Ind. 337. The paragraph under examination does not allege that the appellee had obtained the requisite license. It does, however, allege that he was “prepared and qualified in every particular to perform all the conditions of the contract.” Counsel affirm that this is equivalent to an averment that a license had been obtained. We think otherwise. It may be true that the appellee was prepared and qualified for the duties of a school teacher, and yet equally true that he was an unlicensed teacher. He may have had the necessary learning and ability, and nevertheless have lacked the evidence of his competency, which the law imperatively makes a condition precedent to the right of recovery.

The purpose of the statute is to compel those who desire to enter upon the responsible duties of teachers to submit to an examination by competent school officers, and to effect this purpose the stringent provision prohibiting recoveries

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by unlicensed teachers was incorporated. The question of qualification and preparation must be determined by the school authorities, not by courts or juries. Courts can only inquire whether the requisite license has been obtained, and, if they find that it has not been, then their plain duty is to deny a recovery. The possession of a license is, therefore, indispensable to the right of action. A fact so important should be directly stated, and not left to be conjectured from vague and indefinite general allegations. It was an easy matter for appellee, when he framed his complaint, to aver that he did have the proper certificate or license. The matter was one peculiarly within his own knowledge, and one which he might readily state, fully and directly.

The requirement that teachers shall obtain a license is not a condition of the contract, but is a command of the law. A pleader who seeks to bring himself within a statute must state, not in the form of a conclusion of law, but as a traversable fact, the act done by him and relied upon as bringing him within the statute. One may have performed the conditions of the contract, and still not have performed the act made by law indispensably necessary to a right of action.

The views we have expressed are fully sustained by several well considered cases. In *Casey v. Baldridge*, 15 Ill. 65, the declaration was upon a contract very similar to that here declared on, and contained the allegation: "The plaintiff being then and there legally qualified to teach said school;" and this was held to be insufficient. It was there said by TREAT, C. J., in delivering the opinion of the court: "In this case the declaration is clearly defective. It fails to show that the directors are guilty of any breach of duty. It contains no averment that the plaintiff procured a certificate of qualification, and exhibited it to the directors prior to the commencement of the school." The case of *Smith v. Curry*, 16 Ill. 147, is still stronger, for the court there sustained a motion in arrest, although the declaration contained the

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averment that the plaintiff "was duly qualified." In *Botkin v. Osborne*, 39 Ill. 101, the earlier decisions are expressly approved, and it was said: "As the appellee is seeking to draw money from a public fund, under the provisions of the school law, she must, by the necessary averments, bring her case within its provisions." We are unable to see how any other doctrine could be held without violating familiar rules of pleading, for it is well settled that the facts constituting the breach of duty must always be distinctly alleged in such actions as the present. *Jenness v. School District, etc.*, 12 Minn. 448; *McComb v. Bell*, 2 Minn. 295; *Rhoda v. Alameda County*, 52 Cal. 350.

The introductory clause of the contract describes the contracting parties as "Martin Pruett, trustee of Jackson township and James Farlow, a licensed teacher." It is insisted that the descriptive words annexed to appellee's name make the complaint sufficient.

Counsel for the appellee argue that the words following the name of appellee conclude the township from asserting that he was not licensed as the law requires. This argument is plainly fallacious. A township trustee can not, by inserting a provision by way of recital in a contract, nullify the provisions of the statute.

It is clear enough that the recital does not estop the township from asserting that the appellee did not have the requisite license; but it is not so easy to determine just what force shall be given to the recital. In order to fully understand what the law requires of one who claims to receive compensation for services as a teacher, it is necessary to briefly note some of the statutory provisions upon the subject. Section 28 prohibits the employment of unlicensed teachers. Section 34 directs how and by whom the examination for license shall be conducted, and when a license shall be granted; and section 37 limits the license to the county in which it is granted. It is necessary that the teacher

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should pass an examination, should be of good moral character, and should have a license from the officers of the county wherein he contracts to teach. These are all essential facts, without which no recovery can be had. Can they be inferred from the descriptive words contained in the recital which forms the introductory clause of the contract? To indulge such an inference would violate well settled rules of pleading, and under these, and not those of evidence, the question must be determined. A positive stipulation in the contract, that appellee was a licensed teacher, would not be sufficient, for that might well be true and it still be none the less true that his license was of no force or validity in the county where the contract was made. The law limits the validity of the license to the county, and imperatively prohibits the employment of teachers who are not licensed in the county where they are employed to teach.

The descriptive words are not in the form of a stipulation, but in that of a mere introductory recital. It was the rule at common law, and is the rule under the code, that matters can not be pleaded by way of recital. Facts must be positively alleged. A mere recital in a contract can not supply the place of positive averment. Recital is sometimes used as signifying a stipulation, condition or promise, and, when used in that sense, it may well be held that a pleading is aided by the recital in an exhibit, but it can not be so held where the matters are introductory and stated strictly by way of recital. The distinction is well illustrated in the case of *Shafer v. Bear River, etc., Co.*, 4 Cal. 294, where it was held that the mere recital of an indebtedness in a mortgage would not so aid a declaration as to make it sufficient. In *Hall v. Williams*, 13 Minn. 260, the principle involved in the proposition stated is distinctly declared. It was there said: "It is contended that the complaint is insufficient, because it does not allege that the defendant Williams was ever appointed deputy collector. In answer to this, it is said

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that the bond recites the appointment, and as the bond is a part of the pleading, this recital found in the bond should be treated as an averment of the complaint. This will hardly do. The complaint avers that a bond was made which contains a recital to the effect that Williams had been appointed deputy collector. This is no averment of the truth of that recital. The recital may be valuable as *evidence* of a fact, but it can not be regarded as an *averment of the fact*." The rule prohibiting pleading by way of recital or rehearsal must be adhered to, or an issue could never be formed. It would be impossible to have a proposition affirmed on one side and denied on the other, if pleadings were allowed to merely recite or rehearse matters, and it can make no difference whether the rehearsal or recital is found in the body of the pleading or in an exhibit; the evil is the same in either case.

The words annexed to appellee's name are not only used by way of recital, but they are merely *descriptio personæ*. It is abundantly settled that such words can not control, much less give validity to, a contract. This is the effect of the decision in *Shepherd v. Evans*, 9 Ind. 260, where it was held that words of description added to the name of the payee in the body of the note exerted no controlling effect, but might be rejected as mere surplusage. This is not only the long settled doctrine of this court, but it was the settled law at least a century before this court had any existence. Enforcing the doctrine that words descriptive of the person are not of controlling force are, *Hays v. Crutcher*, 54 Ind. 260; *Means v. Swormstedt*, 32 Ind. 87; *Kenyon v. Williams*, 19 Ind. 44; *Potts v. Henderson*, 2 Ind. 327; *Mears v. Graham*, 8 Blackf. 144; *Hay v. McCoy*, 6 Blackf. 69. In all of these cases the rule is broadly declared, that words following the names of parties operate only as mere *descriptio personæ*, and it is well settled that such words serve only to identify the parties. This is the doctrine applied to contracts with administrators, trustees, receivers, sheriffs, agents

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and assignees, and to licensed apothecaries. *De Witt v. Walton*, 9 N. Y. 571; *Pentz v. Stanton*, 10 Wend. 271; *Rathbon v. Budlong*, 15 Johns. 1; *Reznor v. Webb*, 36 How. Pr. 353; *Hurd v. City of Elizabeth*, 40 N. J. L. 218; *Board, etc., v. Garlinghouse*, 45 N. Y. 249.

It makes no difference whether the descriptive words are simply appended to the signature at the foot of the contract or annexed to the name in the body of the instrument. *Inhabitants, etc., v. Weir*, 9 Ind. 224; *Mears v. Graham*, 8 Blackf. 144; *Prather v. Ross*, 17 Ind. 495. The case of *Hobbs v. Cowden*, 20 Ind. 310, is strongly in point. In that case the complaint was upon an appeal bond, which was filed as an exhibit. The bond contained these recitals: "The undersigned, James Hobbs, trustee of Columbus township, * * on behalf of said township, has this day appealed to the * circuit court," and the words following the name of the obligor were held to be mere *descriptio personæ*. A still stronger confirmation of the view here expressed, that such words exert no material force, is furnished by the case of *Hayes v. Matthews*, 63 Ind. 412. It was held in that case that the erasure of the descriptive words, "Trustees of the First Universalist Church, of Pierceton," did not avoid a promissory note, because such words were not a material part of the instrument. To borrow an illustration, keenly and forcibly put by WORDEN, J., in *Woollen v. Whitacre*, 73 Ind. 198, perjury could not be assigned upon a pleading containing such an allegation as the present, although it might be incontestably true that appellee was not a licensed teacher of Madison county. As held in that case, whether perjury can be assigned, "would furnish a fair test of the construction of the pleading."

Other questions are discussed, but we deem it unnecessary to consider them, for the error in overruling the demurrer to the first paragraph of the complaint requires us to reverse the judgment.

Judgment reversed, at costs of the appellee.

Bailey v. Boyd et al.

No. 7225.

BAILEY v. BOYD ET AL.

COMPOSITION BOND.—*Surety.—Change of Terms.—Release.*—If a creditor holding a composition bond, by an agreement with the debtor, for a valuable consideration, without the knowledge or consent of the surety, materially change the terms of the contract of indebtedness, he thereby releases the surety.

SAME.—*Action on Composition.—Creditor's Election.*—If the debtor performs his part of a composition agreement, no action will lie for the original debt; if not, the creditor has his action on the original debt, and also on the composition agreement for any damages he may have sustained. He may elect to rely upon the composition agreement alone, or, if not complied with by the debtor, enforce payment of the original debt.

SAME.—A composition is an agreement between a debtor and his creditor for payment of a less sum, at a time fixed, than the debt, according to its terms.

From the Marion Superior Court.

W. Morrow, N. Trusler and J. A. Henry, for appellant.
B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

FRANKLIN, C.—The facts in this case are as follows: August 1st, 1871, Boyd borrowed money of Bailey, and executed to him his principal note for five thousand dollars, payable at five years from date, and ten interest notes, for \$250 each, being for interest at ten per cent. per annum, falling due at intervals of six months. The debt was secured by mortgage upon certain real estate, the title to which, as it afterward appeared, was not in the mortgagors, Boyd and wife. Boyd became desirous of repaying the loan before it should mature, and Bailey desiring other security, a composition bond was executed by Boyd, as principal, and Craighead as surety, to Bailey, providing for the payment of a less sum than the principal, at an earlier date, with the interest on the principal to date of payment, or the perfection of the title to the property mortgaged. This bond was executed October 13th, 1871, a little over two months after the debt was contracted. The sum provided to be paid as a satisfaction and discharge

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of the debt was \$4,250, on August 1st, 1872, instead of \$5,000 in five years, or the title might be perfected to the property. The penalty of the bond was \$7,500. In May, 1873, Bailey, the plaintiff below, and appellant here, entered into a new contract with Boyd, with reference to the debt, and took a new mortgage and different security, and changed the time of payment, not only of the \$4,250, provided for in the bond, but also of the original debt of \$5,000, making the latter fall due, not on August 1st, 1876, as by its original terms it would have done, but at any time whenever any one of the original interest notes for \$250 each should become due and not paid. Appellant instituted suit on this new mortgage, and on the 21st day of June, 1875, judgment was rendered against Boyd for the full amount of the original debt then unpaid, interest and attorney's fees, in the sum of \$5,787.36, and a foreclosure of the mortgage. The property included in the second mortgage was sold by the sheriff, and appellant realized therefrom \$1,891.97.

This suit was brought upon the bond, the complaint substantially setting out the foregoing facts. There was a demurrer overruled to the complaint, and a demurrer sustained to the sixth paragraph of Craighead's answer, exceptions reserved, trial by court, finding for plaintiff, motion for a new trial overruled, and judgment rendered for \$3,871.17. The case was appealed to the general term of the superior court, and the judgment at special term was reversed, and cause then appealed to this court.

The errors assigned in the general term of the superior court by Craighead were :

- 1st. The overruling of his demurrer to the complaint.
- 2d. The sustaining of appellant's demurrer to the sixth paragraph of Craighead's answer.
- 3d. The overruling of Craighead's motion for a new trial.
- 4th. The overruling of Craighead's motion as to the amount of the judgment.

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The error assigned in this court is, that the superior court in general term erred in reversing the judgment in special term. The overruling of the demurrer to the complaint, and the sustaining of the demurrer to the sixth paragraph of the answer, present the same question, and that is, did the taking of the second mortgage and the judgment against Boyd upon the original notes, and a foreclosure of the mortgage and sale of the mortgaged property, amount to an abandonment of the bond by appellant, and a release of Craighead as surety?

The bond is a composition bond. A composition agreement is one between a debtor and creditor, whereby the debtor agrees to give, and the creditor to take, a less sum at a time fixed, instead of the original debt, according to its terms. Where the debtor gives or furnishes a new liability, or rather the liability of a new party, as security for the performance of the composition agreement, it becomes a binding contract. Addison Contracts, 3d Am. ed., sec. 380; *Steinman v. Magnus*, 11 East, 390. If the debtor performs his part of the agreement, no action will lie for the original debt. *Pontious v. Durflinger*, 59 Ind. 27. But if he fails in good faith to perform his part of the agreement, the creditor has his action upon the original debt. *Kahn v. Gumberts*, 9 Ind. 430; *McFarland v. Garber*, 10 Ind. 151.

And he might also have an action upon the composition agreement, for any damages that he may have sustained on account of any breaches of the same. While the creditor might rely upon the composition agreement alone, yet if it was not complied with by the debtor, he would have the right to elect to enforce the payment of the original debt.

In this case the real controversy arises over the subsequent arrangement. The taking of the new mortgage to secure the payment of the old notes, and the making of them all payable whenever there was a failure to pay either of the interest notes when due, was certainly changing the terms of

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the composition agreement, both as to the amount and time of payment. If a creditor, by an agreement with his principal debtor, for a valuable consideration, without the knowledge or consent of the surety, materially changes the terms of the contract of indebtedness, he thereby releases the surety. And while it may be said that Craighead was not surety on the original notes, yet he was surety for \$4,250 of the \$5,000, evidenced by the original principal note. And Boyd had agreed to pay, and he had agreed to and became surety for Boyd that he would pay to Bailey the \$4,250, in full satisfaction and discharge of the \$5,000 debt; and Bailey had agreed to accept the same as such. Craighead was, therefore, surety for that identical indebtedness. And if the \$4,250 had been paid on the 1st day of August, 1872, with the interest on the principal note to date of payment, that would have been a complete bar to recovering anything further upon the original notes. That not being done, when Bailey made his subsequent arrangement with Boyd, and took his second mortgage to secure the payment of the original notes, instead of the composition contract, he thereby abandoned and abrogated Boyd's composition contract, and created a new contract for a larger amount and payable at a different time. And it stood then as though no composition agreement had been made, except as to time of payment. And Bailey having taken his judgment upon the new contract for the larger sum, could not afterward legally obtain judgment against Boyd for the smaller sum, which had been merged into, and constituted a part of, the larger judgment. And if Boyd, the principal defendant, was released from having a second judgment against him, for a stronger reason was Craighead, his surety, released; and Boyd's failing to appear and defend could not make a valid claim against Craighead. The plaintiff, in attempting to re-secure what he had by compromise agreed to release, thereby lost the composition security for the amount agreed upon.

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We think the superior court in special term erred in overruling the demurrer to the complaint, and in sustaining the demurrer to the sixth paragraph of the answer; and that that court in general term did not err in reversing the judgment of the special term.

As the foregoing is decisive of the case, it is unnecessary to extend this opinion by presenting and deciding the other errors assigned in the general term of the superior court.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the superior court in general term be, and it is hereby, in all things affirmed, with costs.

No. 7202.

COMSTOCK *v.* WHITWORTH.

PRACTICE.—Default Set Aside.—Trial Granted.—Finding and Judgment in Favor of Defaulting Party.—Former Judgment not Reinstated for Technical Defect.—Where a defendant appeared by attorney and filed a sworn plea, but failed to appear on the day set for trial, and his attorney withdrew his appearance and permitted judgment to be entered by default, and within four days thereafter defendant appeared and had the default set aside, and upon trial of the action prevailed, the Supreme Court can not say that the trial court erred in granting the trial for the excuse given by the defendant, nor will it, on a technical defect in the showing, order the original judgment reinstated.

SAME.—Instruction.—Statement of True Issue.—Where an instruction, taken in connection with others given, fairly and clearly stated the true, if not the technical, issue between the parties, it will not be regarded by the Supreme Court as error.

SAME.—Instruction.—Assuming Facts.—Corroborating Evidence in Support of Witness.—Weight of Evidence.—Province of Jury.—An instruction which states that there is a conflict in the evidence, and undertakes to give a summary of the testimony, is calculated to produce an impres-

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sion on the minds of the jury unjust to one party or the other; and if it affirm, or even assume, that credit must be given to the witness who is best, or apparently best, supported by corroborating evidence, without the qualification that they are the exclusive judges of the weight of evidence, the credibility of the witnesses, and the inferences of fact to be drawn from the proofs, it is erroneous.

From the Delaware Circuit Court.

W. Grose, for appellant.

M. Forkner and *W. March*, for appellee.

Woods, J.—It is claimed that the circuit court erred in setting aside a default and judgment thereon which had been rendered against the appellee, and in overruling the motion of the appellant for a new trial.

The proceeding to set aside the default was had under the 99th section of the code, and was instituted within four days after the rendition of the judgment. The appellee had appeared by attorney, and had answered by a sworn plea, denying the execution of the note sued on, but, not appearing on the day for trial, his attorney withdrew his appearance and permitted the judgment to go by default. The excuse made by the appellee for not attending at the time set for the trial was his own sickness and inability to attend or to communicate with his attorney. The appellant claims that the showing is defective, in that no reason is shown why the appellee could not communicate with his counsel, and procure a continuance, or have the necessary preparations made for proceeding with the trial in his absence. It may be that, if the court had overruled the application, it would have committed no error. *Pate v. Tait*, 72 Ind. 450. But the court having set the default aside, and a trial on the merits having resulted in the appellee's favor, we can not, on account of a defect in the showing so technical as this, order the original judgment reinstated. The rule which has been adopted in reference to errors assigned upon the action of the courts, in granting new trials, would seem to be equally

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applicable to the setting aside of a default, of which the practical result is the same. *Rooker v. Parsley*, 72 Ind. 497; *Collingwood v. The Indianapolis, etc., R. W. Co.*, 54 Ind. 15; *Cronk v. Cole*, 10 Ind. 485.

Among the causes stated for a new trial is alleged error in giving instructions. In the sixth instruction given the court said: "It is not claimed by the plaintiff that the defendants Whitworth and Benbow, or either of them, executed the notes, but it is claimed that the defendants McCorkle, Whitworth and Benbow were partners, and that McCorkle executed the notes by signing the firm name of McCorkle & Co. to them." The objection urged is, that this is a misstatement of the issue, and of the plaintiff's claim. The record, however, shows beyond dispute that the parties named had been partners, and that, after the dissolution of the firm, McCorkle executed the notes, signing the firm name, and the point contested at the trial was whether this was done by the authority of the parties named. By this instruction, taken in connection with others which were given, the true, if not the technical, issue of the case was fairly and clearly stated.

The fourteenth instruction is as follows: "In regard to these questions, there is a conflict in the evidence. McCorkle says there was a general understanding that he should borrow money and execute notes, and he claims that, under this arrangement, he did borrow money and give notes, with the knowledge and approbation of the other defendants. The defendants testify that there was no such arrangement, and that they had no knowledge of such transaction. It is your duty to carefully examine all of the evidence and determine how far either of these witnesses has been corroborated or sustained by the facts proven, and determine which statement is true."

It is almost impossible that such a summary statement of the testimony of the witnesses as is contained in this instruc-

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tion should be precisely accurate ; and, if the statement itself were conceded to be correct, yet the danger that it produced an improper impression upon the mind of the jury, unjust to one party or the other, is manifestly great. The grounds of objection to this instruction are substantially the same as those considered in the case of *Canada v. Curry*, 73 Ind. 246. Beside stating the testimony of the witnesses, and that there was conflict between them, the instruction assumes, if it does not expressly affirm, that credit must be given to the witness who is best, or apparently best, supported by corroborating evidence. No other instruction was given which was calculated to prevent injury from this one. The jury were not even told that they were the exclusive judges of the weight of the evidence, the credibility of witnesses, and of the inferences of fact to be drawn from the proofs.

The judgment is reversed, with costs, and with directions to grant a new trial

No. 7983.

ATCHINSON ET AL. v. LEE ET AL.

PLEADING.—*Answers of Payment and Satisfaction by Exchange.—Reply to one Paragraph by Reference to Another.*—A reply to a paragraph of answer pleading payment, which refers for facts to a third paragraph of answer pleading satisfaction by an exchange, is bad on demurrer. The answer can not thus be made a part of the reply.

SAME.—*Exchange not Payment.*—Such paragraph of reply, even aided by the averments of the answer referred to, is bad, as an exchange of one piece of property for another is not a payment; nor would a reply that such exchange had been made through fraud practiced upon the plaintiff by the defendants be good to an answer alleging payment.

PAYMENT.—*Debt to be Paid.—Exchange.*—In all cases of payment there must be a debt to be paid. In the exchange of property no debt is created; one thing is given for another.

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From the Hamilton Circuit Court.

C. P. Jacobs, for appellants.

MORRIS, C.—The appellees sued the appellants for the price of a span of mules sold and delivered.

The appellants answered the complaint in three paragraphs. The first was a general denial; the second, payment; the third alleged that the mules had been delivered by the appellees to the appellants in even exchange for the sale and conveyance to them by the appellants of the right to make, use and vend a patented improvement in earth-pulverizers and harrows, as secured by letters-patent, issued by the United States to James Lefeber and George W. Shultz, dated October 21st, 1871.

The appellees replied to the answer by a general denial. To the second paragraph of the answer, which alleged payment before suit, the appellees replied specially, in substance as follows :

“That the alleged payment of the indebtedness mentioned in the complaint, contained in second paragraph of said answer, consisted of said conveyance of said pretended right to make, use and vend the pretended improvement in earth-pulverizers and harrows, contained in said third paragraph of said answer, and nothing else whatever.” It is then alleged that the appellants, to induce said appellees to make said exchange, represented that their patent embraced a certain machine of which they had some knowledge, and that it was the best article of the kind known, etc.; that the appellees were ignorant as to the patent, and, relying upon the representations of the appellants, made the exchange as stated in the third paragraph of the appellants’ answer; that said representations were false; that the appellants had no patent for the machine spoken of, and that the machine which their patent did cover was neither new nor useful, but was, in fact, worthless.

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This reply is bad. It refers to the third paragraph of the appellants' answer, and in order to ascertain its meaning, that paragraph of the answer must be regarded as a part of it. The answer can not thus be made a part of the reply. *Knarr v. Conaway*, 42 Ind. 260.

But were we to regard the third paragraph of the answer as a part of the reply, it would still be bad. The third paragraph of the answer alleges an exchange of the mules sued for, for the transfer of a patent-right. An exchange of one piece of property for another can not be regarded as a payment. In all cases of payment, there must be a debt to be paid. In the exchange of property no debt is created; one thing is given for another. It was not competent, therefore, for the appellees to say that by their defence of payment, the appellants meant that they had exchanged a patent-right for the mules. Under the answer of payment, they could not have proved such an exchange. Nor would a reply, that such an exchange had been made through fraud practiced by the appellants on the appellees, be a good reply to the answer alleging payment. We think the reply bad, and that the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

No. 8144.

BYRAM ET AL. v. GALBRAITH ET AL.

PRACTICE.—*General Verdict.—Special Finding.—Supreme Court.*—A judgment rendered upon a general verdict will not be disturbed by the Supreme Court, unless the same be "irreconcilably inconsistent" with the special finding.

SAME.—*Interrogatories by Each Party, and Answers Thereto.—Answers Inconsistent with Each Other.—Discharge of Jury Without Objection and Motion for Venire de Novo.*—Where interrogatories were put by the

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143	387
75	134
150	630
75	134
170	30

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court at the request of plaintiffs, and others at the request of the defendants, and the jury returned a general verdict for the defendants, with answers to all the interrogatories, and no objection was made to the form of either, or to the sufficiency of the answers, and the plaintiffs, without a motion for a *venire de novo*, moved "for a judgment in their favor, upon their cause of action, upon the answers of the jury to said interrogatories propounded by plaintiffs, notwithstanding the general verdict," it was not error for the court to overrule their motion and refuse to render judgment for the plaintiffs upon the answers to their interrogatories, the sets of answers being manifestly inconsistent, each with the other.

SAME.—*New Trial.—Inconsistencies and Contradictions in Special Finding.*—

Supreme Court.—Evidence.—In such case, in the absence of the evidence from the record, the Supreme Court must hold the general verdict right, unless the answers to all the interrogatories clearly show it was wrong. Inconsistencies and contradictions in such answers are not grounds for a new trial.

SAME.—*Venire de Novo.*—When a jury has been discharged without objection to their answers to interrogatories, a motion for a *venire de novo* is too late.

SAME.—*Instructions.—Evidence.—Record.—Supreme Court.*—In the absence of the evidence from the record, the Supreme Court can not say that the trial court erred in giving or refusing instructions, when the action of the court was not erroneous on any supposable state of the evidence.

SAME.—*Supreme Court.—Waiver.*—Assignments of error not discussed by counsel are regarded as waived.

SAME.—*Absence of Evidence.—Supreme Court.*—In the absence of the evidence from the record, the Supreme Court can not know that a verdict is not sustained by the evidence, or that it is contrary to law.

From the Henry Circuit Court.

J. S. Buckles, J. W. Ryan and G. W. Stubbs, for appellants.

J. N. Templer and R. S. Gregory, for appellees.

BICKNELL, C. C.—This was an action by the appellants against the appellees, for goods sold and delivered.

The complaint stated a joint liability.

An account annexed to the complaint set forth several sales amounting in all to \$1,606.34, and several credits, amounting in all to \$671.69. It appeared by the account, that the first two of the sales, together amounting to \$161.³⁷,

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were made on March 15th, 1876 ; the credits were of different dates between March and August, 1876.

The appellees answered separately ; Galbraith pleaded the general denial, and a discharge in bankruptcy. Boyce pleaded the general denial and payment by Galbraith. The appellants replied denying the special defences.

A default taken against Galbraith had been set aside on his motion.

The first error assigned by appellants is, that the court below erred in setting aside said default, but this error is not alluded to in the brief of the appellants' counsel, and is, therefore, regarded as waived.

There was a trial by jury, with a general verdict for defendants, and the jury returned answers to ten interrogatories put to them by the court on behalf of the plaintiffs, and also returned answers to fourteen interrogatories put to them by the court on behalf of the defendants.

Upon the return of the verdict and answers, the appellants moved the court "for judgment in their favor, upon their cause of action, upon the answers of the jury to the interrogatories propounded by the plaintiffs, notwithstanding the general verdict for the defendants." This motion was overruled by the court ; the appellants excepted, and moved for a new trial, assigning the following reasons :

First. The verdict of the jury is contrary to the law and evidence in the cause ;

Second. The verdict of the jury is not supported by the evidence ;

Third. The verdict of the jury is not supported by sufficient evidence ;

Fourth. The verdict of the jury is contrary to law ;

Fifth. The court erred in admitting as evidence to the jury, over the plaintiffs' objection at the time, the certificate of discharge in bankruptcy of the defendant Arthur N. Galbraith ;

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Sixth. The court erred in permitting the defendant James Boyce, while testifying in his own behalf as a witness, to testify in answer to this question of his counsel: "Did you ever execute or sign any writing to the plaintiffs, as security or endorser?" "I never did;"

Seventh. The court erred in allowing the following question to James Boyce, defendant, while testifying, over the plaintiffs' objection at the time: "What paper or agreement, if any, did you sign or execute to the plaintiffs, for the benefit or security of Galbraith, your co-defendant, when he purchased the goods in controversy?" and in permitting the witness, over the plaintiffs' objection, to give the following answer: "Not any;"

Eighth. The court erred in giving to the jury, on its own motion, the instructions numbered from 1 to 6, each and all inclusive;

Ninth. The court erred in refusing to give to the jury the instructions asked for by the plaintiffs, numbered from 1 to 7, each and all inclusive;

Tenth. The court erred in permitting to go to the jury, to be answered by them, over the exceptions and objections of plaintiffs, the interrogatories propounded by the defendants, and numbered from 1 to 14, each and all inclusive, as answered by the jury;

Eleventh. The court erred in overruling the plaintiffs' motion for judgment against the defendants, on the answers of the jury to the plaintiffs' interrogatories.

The court overruled the motion for a new trial; the appellants excepted; judgment was rendered for the defendants upon the verdict. There is a bill of exceptions, which contains only the evidence to which appellants objected, all the instructions given or refused by the court, the submission of the interrogatories to the jury; the interrogatories and the answers thereto; the appellants' motion for judgment, notwithstanding the verdict; the action of the court

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thereon ; the motion and reasons for a new trial, and the action of the court thereon. It does not purport to contain all the evidence given in the cause, and it contains no statement that it exhibits all of such evidence. The errors assigned by appellants, in addition to the first one, already referred to and waived, as hereinbefore stated, are :

Second. The court erred in overruling plaintiffs' motion for judgment on the answers of the jury to the plaintiffs' interrogatories, notwithstanding the general verdict.

Third. The court erred in overruling plaintiffs' motion for a new trial.

The statute provides that, at the request of either party, the jury may be instructed by the court, that, if they render a general verdict, they shall find specially upon particular questions of fact, to be stated in writing, and that said special finding shall be recorded with the general verdict. Practice act, sec. 336, 2 R. S. 1876, p. 171.

"When the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." Practice act, sec. 337.

Under these statutes, it is held that judgment must be rendered on the verdict, unless the same be "irreconcilably inconsistent" with the special findings, *Woollen v. Wishmier*, 70 Ind. 108; *Edwards v. Applegate*, 70 Ind. 325; *Fromm v. Leonard*, 21 Ind. 243; *Miller v. Wade*, 58 Ind. 91; *Murray v. Phillips*, 59 Ind. 56; *Nelson v. Neely*, 63 Ind. 194; *Ohm v. Yung*, 63 Ind. 432; *Monroe v. The Adams Ex. Co.*, 65 Ind. 60; *The Grand Rapids, etc., R. R. Co. v. Boyd*, 60 Ind. 526; *Long v. Brown*, 66 Ind. 160; and that the antagonism must be incapable of removal by any evidence legitimately admissible under the issues, *Amidon v. Gaff*, 24 Ind. 128; and that all the facts necessary to authorize a conclusion adverse to the verdict must appear by such special findings. *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335;

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Campbell v. Dutch, 36 Ind. 504; *Snyder v. Robinson*, 35 Ind. 311. And it is held that, if the special finding be so uncertain that its meaning can not be definitely ascertained, judgment can not be rendered upon it in opposition to a general verdict, *Comer v. Himes*, 49 Ind. 482; and that, if the interrogatories and answers do not show the facts of the case, with such certainty as will enable the Supreme Court to judge correctly of its merits, the judgment of the court below will be respected. *The Indianapolis, etc., R. R. Co. v. McCaffrey*, 62 Ind. 552. It is also held that, where the interrogatories and answers refer to maps and diagrams, not in the record, judgment can not be rendered on the answers, in opposition to a general verdict. *Scheible v. Law*, 65 Ind. 332.

In the case at bar, interrogatories were put to the jury by the court, at the request of the plaintiffs, and other interrogatories were also put to the jury by the court, at the request of the defendants; the jury returned a general verdict for the defendants, together with answers to all the interrogatories; no objection was made to the form of the interrogatories; no objection was made to any of the answers; the answers being accepted as sufficient, they were required by the statute to be recorded with the verdict.

The answers, upon which, under section 337 of the practice act, judgment may be rendered, in opposition to a general verdict, are all the answers taken together, and not some of them, without the others. The proper motion by the appellants would have been a motion for judgment in their favor upon the answers to the interrogatories. The court would then have determined whether, upon the answers taken together, there was sufficient certainty in the facts found to warrant the granting of the motion. But the appellants ignored the answers to the interrogatories put on behalf of the defendants, and moved the court "for a judgment in their favor, upon their cause of action, upon the answers of the

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jury to said interrogatories propounded by plaintiffs, notwithstanding the general verdict."

The interrogatories and the answers are in the record ; they show that, even if the motion for judgment had been made by appellants in proper form, it could not have been granted, because the answers to the plaintiffs' interrogatories are in conflict with the answers to the defendants' interrogatories, and in the uncertainty thereby created, the court, under the authority of the cases hereinbefore cited, 49 Ind. 482 and 62 Ind. 552, would have been compelled to give judgment on the general verdict. The court, therefore, committed no error in refusing to give judgment for the appellants upon the answers to the ten interrogatories propounded by them.

The third error assigned by the appellants is overruling the motion for a new trial. Of the eleven reasons assigned for a new trial, the eleventh is the same as the second error assigned here, and need not be further considered. Of the remaining ten reasons, the first four, the eighth and the ninth are the only ones alluded to, or discussed, in the brief of the appellants' counsel. The others are, therefore, regarded as waived. *Boyd v. Fitch*, 71 Ind. 306.

In discussing the questions involved in the first four reasons alleged for a new trial, the counsel for the appellants, in their brief, use the following language : " Giving to the answers of the defendants' interrogatories the force and effect they will claim for them, such construction renders the two sets of answers so utterly inconsistent as to make it at once apparent that there was not a fair trial of the case between the parties ;" and, again, " if both sets of answers are true, in the view of the case we are considering, there could be no fair finding for either party, and, in such a case, a party against whom, by accident, a general verdict is given, should have instantly, on applying therefor, a new trial." In the absence, however, of the evidence, the general verdict is right, unless the answers to the interrogato-

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ries clearly show it was wrong. Inconsistencies and contradictions in such answers are not grounds for a new trial. If such inconsistencies had been pointed out at the proper time, the court, on motion, would have re-submitted the interrogatories to the jury, with instructions to answer further, so as to remove the inconsistency, even if such removal should require a re-examination of the whole case and a change of the general verdict. *Hyatt v. Clements*, 65 Ind. 12; *Noble v. Enos*, 19 Ind. 72; *Bowman v. Phillips*, 47 Ind. 341. In the case at bar, the jury was discharged without objection to the answers, after which even a motion for a *venire de novo* is too late. *Vater v. Lewis*, 36 Ind. 288. The first four reasons alleged for a new trial amount to this, to wit: That the verdict was not sustained by the evidence, and was contrary to law. But, all the evidence not being in the record, these four reasons present no question for the decision of this court. *May v. Pavey*, 63 Ind. 4; *Kerwin v. Myers*, 71 Ind. 359. The ninth and tenth reasons for a new trial relate exclusively to instructions given and refused; but as the evidence is not in the record, and as the action of the court upon the instructions was not erroneous on any supposable state of the evidence, we are unable to say that the court erred, either in giving or refusing instructions.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellants.

Malson v. The State, *ex rel.* Wing.

No. 7640.

MALSON v. THE STATE, EX REL. WING.

BASTARDY.—*Compromise, Evidence of.*—To entitle a defendant in a bastardy proceeding to give in evidence an agreement of compromise, it must be pleaded.

SAME.—*Death of Child.*—The death of a bastard child does not of itself require a dismissal of the suit.

SAME.—*Recovery.*—The recovery in bastardy proceedings is allowed, not for the benefit of the mother, but for that of the child.

SAME.—*Right of Minor Relatrix to Dismiss Proceedings.*—*Compromise.*—*Approval of Court.*—The act of March 13th, 1875, Acts 1875, Spec. Sess., p. 16, does not confer upon a minor relatrix in a bastardy proceeding the unrestricted right to compromise and dismiss the proceeding, but authorizes the court to examine into compromises made with infants, and to approve or reject them; and a defendant in such proceeding has no right to demand that the written statement of such a relatrix, that she had compromised with him, and desired the prosecution to be dismissed, should be placed of record, without any investigation by the court.

PRACTICE.—*Exclusion of Evidence.*—*Supreme Court.*—*New Trial.*—No question upon the exclusion of evidence can be presented in the Supreme Court unless assigned as one of the reasons in the motion for a new trial.

From the Marion Circuit Court.

G. H. Voss, for appellant.

A. C. Ayres, E. A. Brown and E. Wright, for appellee.

ELLIOTT, J.—Appellant was prosecuted under the statute regulating proceedings in cases of bastardy, and appeals from the judgment rendered against him. Three points are made in his counsel's brief, and these we shall consider in their order.

It is contended that the court erred in refusing to permit the relatrix to cause to be spread of record a statement showing that she had compromised with and released the appellant, and desired that the prosecution against him should be dismissed. It appears that the attorney who represented the appellant presented to the court a paper signed by the relatrix, stating that she had made a compromise with the

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appellant; that the child had died, and that she desired to dismiss the prosecution. It was, at the time the paper was presented, admitted that the relatrix was an infant, seventeen years of age. It further appears that the relatrix afterward came into court and desired to dismiss the prosecution; that this desire was made known through the attorney of appellant; that the court refused to permit a dismissal, and directed the trial to proceed; that thereupon, as the record recites, the attorney, who had presented the paper, "asked leave to withdraw his appearance in said cause so far as he had been appearing for the said relatrix, Alice Wing."

The question for our consideration is: Did the court do right in refusing to permit a dismissal of the prosecution? In support of appellant's contention that the court did not do right, we are referred to *Allen v. The State*, 4 Blackf. 122, *The State v. Wilson*, 16 Ind. 134, *Dodd v. The State*, 30 Ind. 76, *Canfield v. The State*, 56 Ind. 168, and *Evans v. The State*, 58 Ind. 587. We have examined these cases, and find nothing in them sustaining the appellant's position. Upon the contrary, we find doctrines declared which are hostile to it. The holding in *The State v. Wilson* is, that, to entitle the defendant in a bastardy proceeding to give in evidence an agreement of compromise, it must be pleaded; and this, certainly, is opposed to appellant's theory. *Evans v. The State* decides that the fact that the child had died did not preclude the relatrix from securing a recovery, and this doctrine can not be reconciled with appellant's claim, that the death of the child of itself authorized a dismissal. We deem it only necessary to say of the other cases cited that they contain nothing at all touching the question under discussion.

We are also referred to the act of 1875. That act confers upon an adult relatrix the right to compromise and dismiss the proceeding, but makes a different provision for cases where the relatrix is of non-age. The latter provision is as

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follows: "If such witness be a minor, she may dismiss such suit, if it be first shown to the satisfaction of the court, in which the same is pending, that suitable provision has been made and properly secured for the maintenance of the child." We do not regard this provision as giving the minor an unrestricted right to enter into an agreement of compromise; but, on the contrary, we regard it as vesting in the court a supervisory control over the matter. There is nothing in the provision indicating an intention to confer upon the minor a general power to make a contract of compromise, and without some express statutory provision giving such power, the case must come under the general rule that infants can not enter into a contract. Independently of this consideration, the language used clearly requires that such contracts shall receive the sanction of the court before becoming effective. The recovery in bastardy proceedings is allowed, not for the benefit of the mother, but for that of the child. *Heritage v. Hedges*, 72 Ind. 247; *vide authorities*, p. 249. To permit a defendant in a bastardy prosecution to compromise with an infant relatrix, without subjecting the matter to the investigation of the court, would be to put it in the power of such person to impose upon and defraud, not only the relatrix, but the child also. The statute cited makes, as we have seen, a distinction between cases where the relatrix is an adult and those where she is a minor, and this was done for the purpose of placing the latter class of cases within the control of the court.

It is our opinion that the act of 1875 confers upon the court authority to examine into compromises made with infants, and necessarily included within this general authority is the incidental power to approve or reject. In the present case the facts disclosed by the record conclusively show that the court did right in rejecting the asserted compromise. The appellant had gained control of the relatrix, had taken her to the office of his own attorney, procured the latter to

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profess to represent her interests as her counsel, and by promises secured the pretended agreement of compromise, without yielding any consideration.

The objection of the appellant was to the ruling of the court in refusing to permit a dismissal, and in refusing to permit the statement of the relatrix to go upon record. There was no objection or exception to the order directing that the trial should proceed. There was no request that the court should investigate the validity of the asserted compromise agreement. Upon the contrary, the demand was that the court should enter the written statement and the order of dismissal without investigation. There is, therefore, no question before us as to whether the court erred in ordering the trial to proceed without first investigating the merits and validity of the alleged contract of compromise. The sole question is, Did the appellant have a right to demand that the written statement should go of record without any investigation? The appellant certainly had no such right; for the statute to which his counsel refers clearly requires that no such agreement shall be effective until the matter has been investigated and the agreement approved by the court.

The second point made by appellant, and this is barely stated, not argued, is that the court erred in excluding evidence offered by the appellee. The record does not present the question discussed. The exclusion of the evidence was not assigned as one of the reasons for a new trial. There are few more familiar rules than the one which declares that a question upon the exclusion of evidence can not be presented upon appeal unless assigned as one of the reasons in the motion for a new trial.

It is argued that the finding is against the evidence. We have carefully examined all the evidence, and are fully satisfied that the charge against appellant was abundantly sustained, notwithstanding what was said by the relatrix in the

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statement procured by the appellant from her. The circumstances surrounding the parties, the direct and fully proved admissions of the appellant, his conduct in endeavoring to procure a physician to produce an abortion, his conduct in suppressing and fabricating testimony, all combine to sustain the finding of the court, and with it we have neither the right nor the inclination to interfere.

Judgment affirmed, at the costs of appellant.

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127	421
75	146
138	293

75	146
154	641
75	146
157	445

No. 9404.

CASTLE v. THE STATE.

CRIMINAL LAW.—*Juror.—Reasonable Doubt.*—In a criminal cause tried by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty.

SAME.—*Instructions, General and Special.*—If, in such cause, any one of the jury, after having considered all the evidence, and after having consulted with his fellow-jurymen, entertain a reasonable doubt of the defendant's guilt, the jury can not find the defendant guilty; and it is error to refuse to thus instruct the jury, notwithstanding the general charge of the court given to the jury that they must be satisfied beyond a reasonable doubt of the guilt of the defendant.

SAME.—*Individual Responsibility of Juror.*—Each juror should feel the responsibility resting upon him as a member of the jury, and should realize that his own mind must be convinced of the defendant's guilt beyond a reasonable doubt before he consents to a verdict of guilty.

From the Pike Circuit Court.

E. A. Ely and C. H. Burton, for appellant.

D. P. Baldwin, Attorney General, and *A. H. Taylor*, Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was indicted in the court below for an assault and battery upon one O'Neal C. Stubblefield, with intent to murder him. Trial, conviction and judgment.

Castle *v.* The State.

At the proper time the defendant asked that the following charge be given to the jury, which was refused, viz. : "The defendant is presumed to be innocent until his guilt is established by such evidence as will exclude every reasonable doubt ; therefore, the law requires that no man shall be convicted of a crime until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of every reasonable doubt, that the defendant is guilty as charged. So, in this case, if the jury entertain any reasonable doubt of the defendant's guilt, they should acquit him ; or, if they entertain any reasonable doubt as to whether he was excusable and justifiable in the acts complained of, if he committed them, they should acquit him ; or, if any one of the jury, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, should entertain such reasonable doubt, the jury can not, in such case, find the defendant guilty."

Upon looking through the well prepared charges given by the court, we do not find the idea embodied or stated in them, that each juror must be satisfied by the evidence of the defendant's guilt, before a conviction can be had, except as it may be involved in the charge that the jury generally, as a body, must be so satisfied.

The law, where a criminal cause is tried by a jury, contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each juror must be satisfied, beyond a reasonable doubt, of the defendant's guilt before he can, under his oath, consent to a verdict of guilty.

The proposition embodied in the charge asked, that, "if any one of the jury, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, entertain such reasonable doubt, the jury can not, in such case, find the defendant guilty," is correct in point of law. See *Clem v. The State*, 42 Ind. 420. The charge seems to have been, in other respects, correct, and we are of opinion that

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it should have been given. Each juror should feel the responsibility resting upon him, as a member of the body, and should realize that his own mind must be convinced of the defendant's guilt, beyond a reasonable doubt, before he can consent to a verdict of guilty.

We think, notwithstanding the general charge of the court, the defendant had the right to have the charge asked given, thus specifically calling the attention of each juror to the duty and responsibility resting upon him, as well as to the legal rights of the defendant.

Objection is made to the charge of the court as to what would be sufficient to remove reasonable doubt. The charge upon this point seems to have been copied literally from the eighth charge in the case of *Jarrell v. The State*, 58 Ind. 293, which was held to be correct.

Some other questions are made in the case, which we deem it unnecessary to consider.

The judgment will have to be reversed for error in refusing the charge above set out.

The judgment is reversed, and the cause remanded for a new trial. The clerk will issue the proper notice for the return of the prisoner.

No. 6993.

WOOD v. DEUTCHMAN.

PLEADING.—*Application in Reply to Reform Written Instrument Declared on—Departure.—Demurrer.*—A reply seeking to reform a written instrument, affirmed and declared on in the complaint, is a departure from the cause of action, and if it contain no allegation of mutual mistake made in its execution, either in the facts stated or omitted to be stated, nor that the parties, at the time it was executed, did not mutually understand, comprehend or intend the writing as executed, it is insufficient on demurrer.

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PRACTICE.—Partnership.—Parol Evidence Varying Written Agreement.—

Parol evidence is not admissible to vary a written partnership agreement, by showing that a party's interest in the capital stock is greater than that stated therein.

SAME.—Instruction.—Weighing and Comparing Evidence.—Province of Jury.—An instruction, in which the court undertakes to tell the jury the effect or weight of portions of the evidence, how to compare them one with another, and what portions are supported by other portions, is erroneous. The court, in so doing, usurps the powers and invades the province of the jury.

From the Clark Circuit Court.

J. H. Stotsenburg and M. C. Hester, for appellant.

J. K. Marsh, for appellee.

FRANKLIN, C.—August 1st, 1875, appellant and appellee formed and entered into a partnership in a flouring and grist mill business. The value of the mill was \$7,961.57. Appellee assumed the payment thereof, and appellant was to be responsible to him for one-sixth of that amount, or \$1,326.93, and to pay the interest thereon until paid; he was also to pay one-sixth of certain indebtedness against the mill. Appellant was to serve as miller, and they were to divide the profits. Appellant was a practical miller, without means, and appellee had considerable means. Appellant had not the money to pay one-sixth of said indebtedness, and he made arrangements with some third parties to advance the money for him, and take his notes for the same, payable in three years, and he took their written subscriptions to that effect, among which was a subscription by one Runyan for \$50. On the 1st of December, 1875, appellee leased of appellant his interest in the mill during one year, for \$140, and gave him his note therefor; he also, as a part of the lease contract, agreed to employ appellant for the year at a stipulated price, at the end of which time appellant was to take his place back in the partnership. After the execution of the lease, in settling some debts at Louisville, of which appellant was to pay his one-sixth, and appellant not having the money with

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which to pay his part, they agreed that appellee should furnish fifty dollars for appellant, and receive therefor the said subscription of fifty dollars by Runyan and appellant's note to Runyan for the same, payable in three years, which was accordingly done; and the \$50 item in appellee's set-off is for said money so furnished.

Appellant's complaint was in three paragraphs. The first was upon the note given for the year's rent of the mill. The second was upon the written contract for services in the mill. The third was upon an account.

The answer was in four paragraphs; the first a denial, second payment, third and fourth set-off.

The reply was in five paragraphs, two in denial, and the third, fourth and fifth special.

To the fourth paragraph of the answer a demurrer was overruled, and to the third paragraph of the reply a demurrer was sustained.

Trial by jury, verdict for the defendant, and a motion by plaintiff for a new trial overruled; all these rulings reserved by proper exceptions, and judgment for defendant. Appellant has assigned in this court for error:

1st. The overruling of his demurrer to the fourth paragraph of the answer;

2d. The sustaining of appellee's demurrer to the third paragraph of his reply;

3d. The overruling of his motion for a new trial.

We see no valid objection to the fourth paragraph of the answer.

The third paragraph of appellant's reply, to which the demurrer was sustained, was intended as an application to reform the lease to appellee of appellant's interest in the mill for one year, as appellant had declared on in the second paragraph of his complaint. To reform an instrument in the reply, that had been affirmed and declared on in the complaint, would be a departure from the cause of action.

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But there is no allegation in the reply that there was any mutual mistake made in the execution of the lease, either in the facts stated or omitted to be stated; nor that the parties, at the time the lease was executed, did not mutually understand, comprehend or intend the lease as executed. It was insufficient as a pleading to reform, and the court committed no error in sustaining a demurrer to it. *Nelson v. Davis*, 40 Ind. 366; *Baldwin v. Kerlin*, 46 Ind. 426; *Heavenridge v. Mondy*, 49 Ind. 434; *Nicholson v. Caress*, 59 Ind. 39; *Schoonover v. Dougherty*, 65 Ind. 463.

Under the motion for a new trial, appellant insists that there was error in refusing certain testimony offered by the plaintiff, and in instructing the jury. The testimony rejected was an offer by the plaintiff to prove that his interest in the capital stock of the partnership was virtually one-third instead of one-sixth, as stated in the partnership agreement. We think this testimony was properly refused. The written agreement could not be thus varied by parol testimony.

The instruction given and complained of reads as follows:

"The testimony of the defendant in relation to the payment of the interest on the \$1,327, from August to December, 1875, was supported by the written contracts between the parties, while the evidence of the plaintiff was sustained only by that of Weimer. The reception of the Runyan subscription paper by defendant from plaintiff is not to be treated as the assignment of a promissory note, and it was not necessary for the defendant to attempt to collect the same by law from Runyan, before going back on the plaintiff for the payment of the money loaned by the defendant to the plaintiff at Louisville."

The first clause in the instruction is clearly wrong. In it the court undertook to tell the jury the effect, if not the weight, of certain portions of the testimony, and how to compare one portion with another, and what portions of the evidence supported certain other portions of it. This was

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usurping the powers and invading the province of the jury. *Killian v. Eigenmann*, 57 Ind. 480. And we do not think this clause of the instruction correctly stated the effect of the written contracts upon the defendant's testimony. They in no manner tended to support his testimony in relation to the payment of the interest from August to December, 1875; they do not say anything about, or refer to, the interest claimed by defendant. The note, when considered in the light of the testimony, was no evidence whatever of a settlement. It was given simply for the year's rent of the mill. We think this clause of the instruction was not only erroneous, but was well calculated to mislead the jury.

The second clause in this instruction was also erroneous. It applied to the item of \$50 in defendant's offset, the money advanced at Louisville, as before stated.

There was evidence tending to show that, in that transaction, the defendant received and accepted in full satisfaction the Runyan subscription and plaintiff's note, payable in three years. But, if not taken in payment or accord and satisfaction, he could not be held liable to pay or account for the money at an earlier date than he had agreed to pay Runyan in his note. There was no evidence in the record showing that Runyan was not amply able to pay the subscription. Appellee had no right to hold on to the Runyan subscription without attempting to collect it, and appellant's note, without delivery to Runyan, as a reason for obtaining an offset for this money when sued upon the note for rent.

For the foregoing errors, the judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things, reversed, at appellee's costs; and that the cause be remanded to the court below, with instructions to grant a new trial.

Baldwin et al. v. Humphrey.

No. 7914.

BALDWIN ET AL. v. HUMPHREY.

PLEADING.—*Complaint on Promissory Note.*—A complaint on a promissory note in the form prescribed by statute, 2 R. S. 1876, p. 357, form No. 1, is sufficient.

PRACTICE.—*Supreme Court.*—*Default.*—*Objection to Amount of Damages.*—An objection to the amount of damages assessed can not be raised for the first time in the Supreme Court. After default of the party, such an objection can be made by him only by appearing in the court below and there disputing the amount of the damages.

SAME.—*Appeal After Judgment by Default.*—A party against whom a judgment by default has been rendered may appeal therefrom directly to the Supreme Court, without having first applied to the trial court to set aside such judgment.

From the Grant Circuit Court.

G. W. Harvey, for appellants.

J. L. Custer, for appellee.

BICKNELL, C. C.—The appellee brought suit against the appellants on a joint promissory note, of which the following is a copy:

“MARION, IND., Nov. 23, 1876.

“Sixty days after date we promise to pay to Charles W. Humphrey, or order, one hundred and thirty-seven $\frac{5}{100}$ dollars, with interest at ten per cent. per annum, and attorney’s fees, value received, without any relief whatever from valuation or appraisal laws.

“\$137 $\frac{5}{100}$.

[Signed] L. D. BALDWIN.

“DANIEL W. HIATT.”

The summons was issued on January 23d, 1879. It was personally served on each of the appellants on the 24th of January, 1879. It was returnable on the first day of the February term, 1879, of the Grant Circuit Court, which was the 3d day of February.

The record, as corrected upon a *certiorari*, shows that, on the 5th day of February, 1879, the third judicial day of the term, a judgment by default was rendered against the appellee.

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lants for one hundred and eighty-four $\frac{4}{5}$ dollars, with ten per cent. interest and costs. From this judgment the appeal was taken. The following are the errors assigned:

"1st. The court erred in rendering judgment upon an insufficient complaint;

"2d. The court erred in rendering judgment against the appellants, for the reason that there was filed with the complaint no copy of the note declared on;

"3d. The court erred in rendering judgment against the appellants by default, on the first day of the February term of the Grant Circuit Court, 1879."

As to the first error: The complaint in this case was good. It was in the form prescribed by statute, 2 R. S. 1876, p. 357, form No. 1, except that it contained the unnecessary averment that Lancaster D. Baldwin executed the note by the name of L. D. Baldwin. Mere surplusage does not vitiate.

As to the second error: It is not true. A copy of the note declared upon was filed with the complaint.

As to the third error: The corrected record shows that the judgment was not rendered on the first day of the term, but on the third day, which was right.

The appellants, in their brief, insist that the judgment included ten dollars and thirty cents too much interest; that the court computed the interest at ten per cent., up to the date of the judgment, whereas the interest to be allowed, between the maturity of the note and the date of the judgment was only six per cent. This matter was not embraced in the assignment of errors, and such an objection can not be raised for the first time in this court. *Barnes v. Bell*, 39 Ind. 328. After default, such an objection can be made only by appearing in the court below and there disputing the amount of the damages. *The Marion, etc., R. R. Co. v. Lomax*, 7 Ind. 406; *Fisk v. Baker*, 47 Ind. 534. Even after a trial, excessive damages can not be separately assigned as error. It would be merely cause for a new trial. *Clafin*

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v. *Dawson*, 58 Ind. 408. The appellee insists that after default there can be no appeal without some steps taken in the court below to obtain relief. Formerly that was the general rule. *Barnes v. Conner*, 39 Ind. 294; *Johnson v. Ikerd*, 48 Ind. 380; *Blair v. Davis*, 9 Ind. 236; *Harlan v. Edwards*, 13 Ind. 430; *Cincinnati, etc., R. R. Co. v. Calvert*, 13 Ind. 489. But there were exceptions to it. Thus, an appeal was allowed after default, without any motion in the court below, where the defendant had not been notified of the pendency of the suit. *Abdil v. Abdil*, 26 Ind. 287; *Cochnower v. Cochnower*, 27 Ind. 253; *Kyle v. Kyle*, 55 Ind. 387; *Bristor v. Galvin*, 62 Ind. 352. And it was held that, if the complaint does not state facts sufficient to constitute a cause of action, a defaulted defendant may appeal, assigning as error the insufficiency of the complaint, without having made a motion for relief in the court below. *Strader v. Manville*, 33 Ind. 111; *Wright v. Norris*, 40 Ind. 247. And finally, in *Odell v. Carpenter*, 71 Ind. 463, the entire rule was abrogated, and Howk, J., delivering the opinion of the court, said: "The more recent rule on this point, approved by this court, would seem to be, that a party, against whom a judgment by default has been rendered, may appeal therefrom directly to this court, without having first applied to the trial court to set aside such judgment."

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellants.

The City of Fort Wayne *v.* Rosenthal.

No. 7493.

THE CITY OF FORT WAYNE *v.* ROSENTHAL.

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75	156
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166	555

CITIES AND TOWNS.—Members of Board of Health.—Physician.—Small-Pox.

—*Vaccination.—City Ordinances Construed.*—City ordinances requiring the board of health to have persons vaccinated as a protection against small-pox do not thereby impose upon the board, or its members, the duty to do, but only to provide for the doing of, such services as may be required of physicians.

SAME.—Contract of Board with Member Void.—Statute Construed.—A member of the board of health of a city, appointed under authority of section 48, is an officer within the terms of section 52 of the act of March 14th, 1867, for the incorporation of cities, 1 R. S. 1876, pp. 267, 288 and 288, and can not be interested in any contract by which any indebtedness is created against the city.

SAME.—An employment by a board of health of a city of one of its members to vaccinate pupils in a public school is a void contract, and creates no liability against the city.

SAME.—Voluntary Services.—Quantum Meruit.—In such case, the services rendered by a physician, who is a member of the board of health, are voluntary, and confer upon the city no value or benefit which could have been rejected, and by keeping which the city ratifies the contract and becomes liable upon a *quantum meruit*, or a *quantum valebat*.

SAME.—Agency of Public Officers.—Buying.—Hiring Himself.—An officer of a city can not as agent contract with himself personally, buying what he is employed to sell, or hiring himself to do a service which he is employed to procure to be done.

From the Allen Circuit Court.

A. Zollars and F. T. Zollars, for appellant.

W. G. Colerick, H. Colerick, and T. W. Colerick, for appellee.

Woods, J.—Error is claimed in the sustaining of the demurrer to the second paragraph of the answer, and in the overruling of the motion for a new trial.

The answer referred to is nothing more than an argumentative denial of the indebtedness charged in the complaint, and, if good, admitted of no proof which was not admissible under the general denial, which was also pleaded.

The principal question presented under the ruling upon the motion for a new trial is, whether the finding and judg-

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ment of the court are in accordance with the law and the evidence.

There is no material dispute about the facts of the case, which are, substantially, as follows: The appellee is a physician, and, together with Drs. Erwin and Myers, constituted the board of health of the city of Fort Wayne during the year 1869. On November 9th, 1869, the small-pox appeared in the city in a malignant form, and it became necessary to take steps to prevent the spread of it. The public schools were in session. On the same day the common council of the city adopted a resolution, "That the board of health be authorized to notify the public that an examination of scholars at the various schools will be made by said board, and, if deemed necessary to vaccinate, they will order it done by the family physician; and, if parents are unable to pay for it, the same shall be done at the expense of the city." Notice was accordingly published in the *Sentinel*, on the 11th, that the board would visit the East-End free school, on the 12th, for the purpose of inspecting the vaccination of the pupils, and that absentees must call on the board before re-admission. The following ordinances of the city, admitted to have been duly passed, were put in evidence. Chapter 14, passed April 14th, 1866:

"SEC. 6. The board of health may take such measures as they may, from time to time, deem necessary, to prevent the spread of the small-pox, and all other contagious and pestilential diseases, by issuing an order requiring all persons in the city, or any part thereof, to be vaccinated within such time as they shall prescribe; and all persons refusing or neglecting to obey such order shall be liable to the penalties hereinafter provided for the violation of this chapter: *Provided*, That it shall be the duty of the board to provide for the vaccination of such persons as are unable to pay for the same, at the expense of the city."

Chapter 49, passed April 28th, 1878:

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“SECTION 1. The common council shall, at their annual meeting, appoint, as a board of health of said city, three respectable physicians, at least one of whom shall be a practicing physician, which board shall serve one year, and until their successors are appointed and qualified.

“SEC. 2. Said board shall appoint one of their number president, who shall preside at their meetings, and shall be, *ex officio*, the health officer of said city; and a secretary, who shall keep an accurate record of their proceedings, in a proper book, to be furnished by the city. Any two of such board shall constitute a quorum.

“SEC. 3. The board of health shall have power, whenever it may deem it necessary for the health of the city, to take the most prompt and efficient measures to prevent the introduction of malignant or infectious diseases in the city, and for the immediate and safe removal of any person or persons, who may be found therein, infected with any such disease.

“SEC. 4. It shall be the duty of the health officer to examine into all nuisances, sources of filth, and causes of sickness in the city, which may come under his observation, and when notified of the same, and he shall cause the same to be removed or destroyed, or disinfected, under the direction of the board of health, at the expense of the person on whose premises such nuisances, causes of sickness, or sources of filth, shall be found to exist. * * *

“SEC. 11. The board of health shall each be paid an annual salary, to be fixed by the common council.

“SEC. 13. It shall be the duty of the board of health, whenever any person or persons are sick with contagious, infectious or malignant diseases, to inquire into the circumstances of such person, and, if he be a pauper, to notify the trustee of Wayne township to take care of such pauper, and remove him to a safe place, and no expense shall be incurred on the part of the city for the care or removal of such pau-

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per, except in case of emergency, when the most prompt and speedy action may be deemed necessary by said board."

The record of the proceedings of the board of health on November 8th, 9th, 12th, 15th, 16th, 17th and 26th, 1869, were put in evidence, showing their order for a general vaccination of the pupils of the schools, their visits to the schools for the inspection of the vaccinations, and reciting the fact of vaccinations made.

The plaintiff testified, and there was no opposing testimony, that the board, Dr. Erwin and himself only being present, employed him to vaccinate pupils in the schools, whose parents were unable to pay therefor, and that he did accordingly vaccinate two hundred and eleven pupils, who, and whose teachers, said that their parents were unable to pay therefor, and whose parents, from all he could learn and as he believed, were not able to make such payment. The value of such service was proven, and the court found it to be \$150. The plaintiff's salary, as a member of the board of health was seventy-five dollars, which had been paid him for the year 1869.

This brings us to the question whether, for the services so by him rendered, the appellee was entitled to compensation from the city. The appellant disputes the right on two grounds: First, that the appellee did the service as a member of the board of health of the city, and is, therefore, entitled to no compensation beyond his salary; and, second, that the board of health had no power, and, on grounds of public policy, was forbidden, to employ one of its own number to do such service; and, especially, that the appellee's employment was invalid, because made by himself and one other only of the members of the board. We do not assent to the proposition that the services were such as came within the appellee's duties as a member of the board of health. The ordinances which were put in evidence, and on which the appellant makes this claim, do not impose on the board,

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or its members, the duty to do, but only to provide for the doing of, such services. The second ground, however, seems tenable. The board and its members held positions of trust and confidence toward the city. Their responsibilities in reference to the services, for which the appellee claimed compensation, were at once important and delicate. It was for them to decide whether an emergency had arisen, and what children were entitled to be treated at the public expense. The emergency, if it existed at all, was such as called for immediate and authoritative decision upon the case of each applicant. According to his own testimony, the appellee took upon himself his share of this responsibility. He went to the school-houses, and upon the statements of the children and their teachers, that the parents were unable to pay for it, he did the work himself, at the rate, probably, of one hundred and fifty, or more, per day, and charged the city one dollar for each vaccination. The antagonism between the appellee's private interest and his public duty, it is manifest, was very great, and calculated to cast suspicion upon his discharge of duty, no matter how faithfully and conscientiously it was done. Let it be understood that such personal advantage may result to a member of the board, and suspicion not only attaches to his selection of those who may be served at public expense, but it extends to and taints the original decision and declaration of the board, that an emergency existed which required the work to be done.

By section 52 of the act for the incorporation of cities, approved March 14th, 1867, 1 R. S. 1876, p. 288, it is provided that "No member of the common council, or other officer of such city shall, either directly or indirectly, be a party to or in any manner interested in any contract or agreement with such city for any matter, cause or thing by which any liability or indebtedness is in any way or manner created against such city; and if any contract should be made in contravention of the foregoing provisions, the same

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shall be null and void." It is true, as has been suggested, that by section 8 of the same act, "The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer, civil engineer, street commissioner and marshal, and * * city attorney and city judge," and that a member of the board of health is not one of the officers so named. But there are other city officers besides these, as is manifest from the 48th section of the act, in which it is provided that the common council shall appoint annually "a chief engineer of the fire department, three commissioners, to form a board of health, and, in their discretion, a sealer of weights and measures, and as many supervisors of streets, to act under the direction of the street commissioner, as they may deem necessary, and all other officers which the by-laws may create or require, * * * and the common council may, by ordinance, prescribe such rules and regulations, in addition to those herein contained, for the qualification and official conduct of all city officers, as they may deem for the public good," etc. We are of the clear opinion that the appellee was an officer of the city, within the meaning of the 52d section.

But if this were not so, and the case were to be determined by the general principles of law, the result would be the same. Section 52 is only a re-enactment of the well established rule, that an agent, in reference to the subject of the agency, must not put himself in a position which is adverse to that of his principal. As agent he can not contract with himself personally. He can not buy what he is employed to sell. If employed to procure a service to be done, he can not hire himself to do it. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case which comes within its reason.

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It follows that the services rendered by the appellee were not rendered at the request of the city, or of an authorized agent who could employ the appellee. They were, therefore, voluntary services, and they conferred upon the city no value or benefit which could have been rejected, and by keeping which the city can be said, within the authorities on the subject, to have ratified the contract, and to be liable upon a *quantum meruit* or *quantum valebat*.

The judgment is reversed, with costs, and with instructions to grant a new trial.

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No. 7962.

LORCH v. AULTMAN & CO.

PRACTICE.—Another Action Pending.—Motion to Dismiss.—Suit for Possession.—Foreclosure of Mortgage on Personality.—In an action by a mortgagee to recover possession of personal property, a motion by the purchaser of the property to dismiss, because another action was pending against the defendant and others for the foreclosure of the mortgage, was correctly overruled.

SAME.—Right of Mortgagee to Possession.—Answer in Abatement.—In such case, the pendency of the action to foreclose would not deprive the mortgagee of his right to possession. The question could be raised only by an answer in abatement.

LIEN.—Mortgage.—Appointment of Receiver.—The appointment of a receiver does not, as a rule, affect or divest an existing lien, but is made subject to such rights and liens as had been previously acquired.

SAME.—Partnership.—Sale.—A sale of mortgaged property by a receiver appointed in a suit between partners for a settlement of partnership business, if reported to and confirmed by the court, gives the purchaser so much interest in the property only as the firm had, and does not divest or affect the paramount mortgage lien of a stranger to the record.

PRACTICE.—Actions in Rem.—Actions in Personam.—Notice.—In proceedings strictly *in rem*, the seizure of property in controversy is notice to every one, and the whole world are deemed parties to, and bound by, such proceedings. In proceedings partly *in rem* and partly *in personam*, he who holds a paramount adverse title, unless a party to the proceedings, is not bound by them.

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ESTOPPEL.—*Presence of Agent at Receiver's Sale.*—The fact that an agent of the mortgagee was present at a receiver's sale of the mortgaged property, and stood by and witnessed the sale without disclosing the mortgagee's title, and without objection, the record showing that the mortgagee was not a party to the proceeding and had a paramount title, and not showing that any agent authorized to waive or sacrifice his rights was present at the sale, does not estop the mortgagee to object to such sale.

From the Spencer Circuit Court.

G. L. Reinhard, for appellant:

D. T. Laird, for appellee.

MORRIS, C.—This action was brought to recover a threshing machine, Monitor engine, and the machinery thereto belonging. The complaint stated that, on the 26th day of July, 1877, Francis M. Harvey, George W. Wood, William Pence, and William H. H. Harvey, executed to Aultman & Co. a mortgage on said thresher, engine and machinery to secure the payment of three notes, executed by the mortgagors to the mortgagee, amounting in all to the sum of \$1,300; that two of the notes were due, and that the makers had failed to pay them. The mortgage was duly recorded within the time required by law, and copies of it, and the notes which it was given to secure, were filed with the complaint. It was averred that the appellee was a corporation, and entitled to the possession of the mortgaged property; that the appellant, on the 17th day of December, 1878, at the county of Spencer, wrongfully took possession of said property, which was of the value of \$1,300, and detained the same in said county without right. There was a second paragraph of the complaint, which was substantially the same as the first.

The appellant appeared, and moved the court in writing to dismiss the action on the ground, as stated in the motion, "that there is another action pending against the defendant and others, at the present term of this court, for the foreclosure of said mortgage, it being a prosecution against the same property, and that the plaintiff is prosecuting this suit

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for the same matter, while he is foreclosing his mortgage.'" This motion was overruled.

The appellant then answered in one paragraph. The answer admits the execution of the mortgage, as alleged in the complaint, but says, that at the November term, 1878, of the Spencer Circuit Court, in a suit wherein the appellant was plaintiff and William H. Harvey was defendant, brought to adjust, settle and dissolve a copartnership between him and said Harvey, William Blount was appointed a receiver of the copartnership property, for the purpose of winding up the copartnership business ; that, by a decree of said court, the said Blount, as such receiver, was ordered to sell the property in controversy for the payment of the debts of the firm in the order of their priority ; that the debt which the mortgage was given to secure was a partnership debt, and that the court ordered that it should be paid out of the proceeds of said sale before any other claims against said partnership ; that, pursuant to said order, the said Blount, as such receiver, on the 16th day of December, 1878, sold said property at public auction, after having given due notice, to the appellant, for \$200, and delivered it to him ; that the appellee, by its agents, was present at said sale, did not object to the same, but discouraged bidding, without asserting any claim or title to the property.

The appellee demurred to the answer. The demurrer was sustained, and, the appellant electing to stand by his answer, judgment was rendered in favor of the appellee.

The overruling of the appellant's motion to dismiss the suit and the sustaining of the demurrer to his answer are assigned as error.

The court did not err in overruling the motion to dismiss the suit. If the appellee, by reason of the mortgagor's failure to pay the notes as they matured, was entitled to the possession of the mortgaged property, the pendency of the suit to foreclose the mortgage would not deprive him of that

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right. The question could only be raised, however, by an answer in abatement, duly verified.

The answer of the appellant is somewhat indefinite. How he and his partners were interested in the mortgage property is not stated, nor is it stated how they became the debtors of the appellee. They neither executed the notes nor the mortgage. It is not stated that the parties owned the property. It may be inferred that the appellant and his partner in some way purchased the property from the mortgagors, and assumed the payment of the notes the mortgage was given to secure, and perhaps this is sufficient.

It is alleged in the answer, that the Spencer Circuit Court took possession of the property through its receiver, Blount. Assuming that the court had jurisdiction of the property, for the purposes stated in the answer, could the court dispose of the property so as to extinguish the rights of the appellee therein? It was not a party to the proceeding in which Blount was appointed receiver, nor was it in any way before the court. The appointment of a receiver will not, as a general rule, affect or divest an existing lien. The appointment is regarded as being made subject to such rights and liens as have been previously acquired. *Becker v. Torrance*, 31 N. Y. 631; *Davenport v. Kelly*, 42 N. Y. 193; *High Receivers*, sec. 440.

But it is averred in the answer that the court by its decree ordered the receiver to sell this specific property for the purpose of paying the appellee's debt, and that the sale was made pursuant to this decree. It is not alleged in the answer that this sale was reported to or confirmed by the court, nor that the appellee received any part of the proceeds of the sale. Is such a decree, and a sale made pursuant to it, binding upon a stranger to the record? Can it have the effect to divest one not a party to the proceeding of his right to and interest in the property so sold?

At the time the suit was commenced by the appellant against his partner, Harvey, and at the time Blount was ap-

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pointed receiver, the appellee, through the default of the mortgagors, was entitled to the possession of the property in dispute. It derived this right, not from the partners and parties to the suit, but from others, and asserts it through them. They were in no way liable for the debts of the firm of Lorch and William H. Harvey. The debts of this firm were not chargeable to the mortgagors of the appellee. The claim of the appellee was not only adverse to the appellant, but to all who might claim through him and his partner.

The appointment of Blount as receiver gave him a lien upon and right to the interest of the parties to the suit in the property in dispute, but not upon the private and paramount title of the appellee, derived, not from them, but from those from whom they must have obtained whatever interest they had in the property in controversy. *Van Alstyne v. Cook*, 25 N. Y. 489.

In proceedings strictly *in rem*, it is held that the seizure of property is notice to every one, and, therefore, the whole world are deemed parties to, and bound by, such proceedings. *Sheldon v. Newton*, 3 Ohio St. 494; *Grignon's Lessee v. Astor*, 2 How. 319; *Satcher v. Satcher's Adm'r*, 41 Ala. 26.

But the suit between Lorch and his partner, William H. Harvey, was not a proceeding *in rem*. The most that can be said is, that by the appointment of the receiver, and the seizure of the property through him, the proceeding became somewhat analogous to proceedings *in rem*. But as such receiver, Blount could only take possession of the rights and interests of the parties to the suit.

In proceedings partly *in rem* and partly *in personam*, he who holds a paramount adverse title, unless a party to the proceedings, is not bound by them. *Shields v. Ashley's Adm'r*, 16 Mo. 471; Rorer Judicial Sales, 2d ed., sec. 38.

Here the appellee derives its title from Francis M. Harvey, William Pence, George Wood and William H. H. Harvey, to whom it had sold the property, who executed to it the

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notes and mortgage to secure the purchase-money. Its title is, therefore, paramount to, and independent of, any claim which Lorch and his partner could have to the property in dispute. The appellant claims title through himself and his partner. The sale of Blount as receiver passed to Lorch the title of the firm, and nothing more. The appellee had no day in court, and can not be bound by the receiver's sale. The court could not, in its absence, without its knowledge or consent, dispose of its rights. It had no connection with the partners, Lorch and Harvey.

It is insisted that the appellee is estopped to object to the receiver's sale, on the ground that, through its authorized agents, it stood by, witnessed the sale without disclosing its title, and without objection. It does not appear, however, from the answer, that any agent of the appellees, authorized to waive or sacrifice its rights, was present at the sale. The record and decree, under which the appellant purchased and claims title, disclosed the facts that the appellee was not a party and had the paramount title. Under such circumstances no estoppel arises. The appellant knew the appellee's rights, and, presumably, that the receiver had no power to dispose of them. He will not, under such circumstances, be allowed to insist that the proceedings estopped the appellee. We think there was no error in sustaining the demurrer to the appellant's answer, and that the judgment below should be affirmed.

PER CURIAM.—It is ordered that, upon the foregoing opinion, the judgment below be in all things affirmed, at the costs of the appellant.

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No. 8003.

THE AMERICAN INSURANCE COMPANY v. GALLAHAN.

75	168
130	428
75	168
141	595

PROMISSORY NOTE.—Insurance Policy.—Charter.—Premium Note Payable in Instalments.—Demand of Instalments not Due.—Complaint.—Averments Struck Out.—In an action by an insurance company upon a premium note, absolute on its face, payable in annual instalments, seeking to recover for all instalments for a failure to pay the first, by a reference to the policy and a provision in the charter, it is not error to sustain the defendant's motion to strike out of the complaint all averments seeking to show that all the instalments of the note subsequent to the first had matured upon failure to pay it for more than thirty days after notice.

SAME.—Consideration.—Policy and Charter not Made Parts of Note.—The statement in such note, that its consideration was a policy of insurance, did not change its legal effect, nor make such policy a part of the note, much less the charter.

SAME.—Written Agreement.—Verbal Understanding.—A written agreement can not be controlled by a contemporaneous verbal understanding of the parties inconsistent with it.

SAME.—In such case, the agreement that the rights of the parties were to be determined, not by the note itself, but by the plaintiff's charter, was a verbal agreement that varied the terms of the note, and, therefore, inoperative.

PRACTICE.—Bill of Exceptions.—“Evidence Offered.”—Evidence Given.—A bill of exceptions which purports to contain the evidence in a cause, but concludes, “This was the evidence offered in the cause,” is not sufficient. The Supreme Court can not know from the bill that the “evidence offered” was admitted and given.

From the Gibson Circuit Court.

R. M. J. Miller, for appellant.

J. E. McCullough and *L. C. Embree*, for appellee.

BEST, C.—The appellant sued the appellee in a complaint of two paragraphs. In the first it was alleged, in substance, that the appellee, on the 26th day of May, 1876, by his note, a copy of which was filed, promised to pay appellant twelve and $\frac{5}{100}$ dollars on the 1st days of May, 1877, 1878, 1879 and 1880; that said note was executed in consideration of a policy of insurance, issued by the appellant to the appellee; that the policy made the charter of the appellant a part of it, and that the charter provided that, in case any in-

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stalment of any note shall remain due and unpaid for more than thirty days after notice forwarded to the maker, as provided by such charter, then the entire note shall become due and payable ; that said note was made with the understanding and agreement that the policy and charter should constitute a part of the contract between the parties, and that the obligations of the parties in relation to said note were to be determined by reference to the policy and charter ; that, after the first instalment had matured, notice had been given more than thirty days, etc. ; whereby the whole note became due and remained unpaid.

In the second it was averred, substantially, that said note was made in Illinois ; that it was made for a policy of insurance issued by the appellant there, and that, by a statute of that State, it was provided that if the maker should fail to pay any instalment of any note, given for a policy of insurance, issued by the appellant, for more than thirty days after notice of its maturity, the whole note should become due ; that the appellee had failed to pay the first instalment, and notice thereof had been given thereafter for more than thirty days before the commencement of the suit.

Upon the appellee's motion, the court struck from the first paragraph all that portion after the figures "1880," and before the averment "that, after the first instalment had matured, notice had been given," etc., and that the whole note was due and unpaid, thereby striking from the paragraph all averments seeking to show that all the instalments of the note subsequent to the first had matured. This ruling the appellant reserved. Issues were formed, submitted to the court for trial, and a finding made for \$13.30.

The appellant moved for a new trial, because the finding was contrary to law, was not sustained by sufficient evidence, and the amount of the recovery was too small. This motion was overruled, an exception taken, and judgment entered upon the finding. From this judgment the appell-

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lant appeals, and assigns as error the order of the court in striking out a portion of the first paragraph of the complaint, and in overruling the motion for a new trial.

We are of opinion that the court did not err in striking out the portion of the first paragraph of the complaint of which appellant complains.

The note, upon its face, was absolute and unconditional. It contained a promise to pay the sum of twelve and $\frac{5}{10}$ dollars, at stated times, and there was nothing in it to indicate that such sums were to be paid at any other time or upon any contingency. The statement in it, that its consideration was a policy of insurance, did not change its legal effect, nor make such policy a part of the note. Without it, the law would presume a consideration, and with it the actual consideration was shown—that, and nothing more. Nor did the agreement and the understanding of the parties that the policy should constitute a part of the contract, and that the rights of the parties should be determined by a reference to it and the charter, change the terms of the note, or constitute either a part of it. This “agreement and understanding” was in parol, and not in writing, and it is well settled that the terms of a written agreement can not be controlled by a contemporaneous verbal understanding of the parties, inconsistent with it. *Durland v. Pitcairn*, 51 Ind. 426.

The note was for the payment of certain sums at specified times, and the agreement, that the rights of the parties to the note were to be determined, not by the note itself, but by the charter of the appellant, which prescribed that, upon the happening of a certain contingency, all instalments should at once become due, was a verbal agreement that varied the terms of the note, and therefore was inoperative. *McClinic's Adm'r v. Cory*, 22 Ind. 170.

The note did not make either the policy or the charter a part of it, and as it was not alleged that the note and policy were made at the same time, so as to constitute one contract,

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its terms can not be controlled by either. To authorize this it was necessary to aver that they were executed under such circumstances as constituted them one contract. *Allen v. Noffsinger*, 13 Ind. 494; *Durland v. Pitcairn*, 51 Ind. 426.

We can not say that the motion for a new trial was erroneously overruled for the reason that the evidence is not in the record.. The bill of exceptions purporting to contain the evidence concludes with the statement that "This was the evidence offered in the cause," but does not show that anything offered in evidence was admitted, except a receipt and a notice. The evidence so offered can not be treated as admitted, as has heretofore been decided by this court. *Goodwine v. Crane*, 41 Ind. 335.

For these reasons, we think the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 8125.

SLADE v. LEONARD, ADMINISTRATRIX.

PRACTICE.—*Action for Money Loaned.—Exclusion of Evidence.—Decedent's Estates.—Intestate.—Witness.*—On the trial of an action by an administratrix, for money loaned by her intestate, the court erred in refusing to permit the defendant to prove by a competent witness, that the money claimed to have been a loan to him was, in fact, drawn by him from a bank on a check of the intestate, in his lifetime, and at his request paid to the witness, with other money advanced, in discharge of a note of the intestate held by him.

SAME.—The fact that the complaint alleged a promise to pay the sum to plaintiff after the death of her intestate did not render the proffered evidence inadmissible.

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SAME.—*Declarations of Intestate.*—On such trial, it was error for the court to refuse to permit the defendant to prove by competent witnesses declarations and admissions of the intestate as to the amount due him from the defendant.

SAME.—The declarations of an intestate are admissible against an administrator, or any other claiming in his right.

SAME.—*Account Book of Intestate Used in Settlement with Defendant.*—On such trial, the defendant was entitled to such evidence as the account book of plaintiff's intestate might furnish touching the alleged indebtedness, and it was proper for the court to permit questions to be put to the plaintiff as a witness, directed to an identification of it and the book of defendant, as the books used in making an alleged settlement; but the rejection of the proposed testimony was not an error injurious to defendant, the jury having found a verdict on an item not included therein.

From the Union Circuit Court.

B. Burke, L. H. Stanford, W. M. Casterline and T. W. Bennett, for appellant.

T. D. Evans, for appellee.

NEWCOMB, C.—The appellee, as administratrix of the estate of Clarence R. Leonard, filed a complaint of three paragraphs against the defendant, Slade. The first and second alleged an indebtedness to the deceased, in his lifetime, for money loaned ; and the account, filed with these paragraphs, consisted of two items, one of \$60 and one of \$80.

The third paragraph declared on an alleged indebtedness of \$140, the balance due on account of \$434.63, the whole account, with the credits thereon, being filed with the complaint, and of the credits it was shown that \$153.38 had been paid to the plaintiff as administratrix.

The defendant filed a general denial and two affirmative answers. The second paragraph alleged a settlement with the plaintiff of all demands and accounts between the defendant and said Clarence R. Leonard ; that the respective account books of the parties were present at such settlement, and, after a full examination of said accounts, there was found due to the estate of Leonard \$153.38, which sum was paid to the plaintiff, who gave the defendant a receipt there-

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for, stating in such receipt that said sum was in full of all accounts. A copy of the receipt was filed with the answer.

The third paragraph pleaded an account as a set-off. The reply of the plaintiff admitted a part of the set-off, but denied all the other matters alleged in the affirmative answers.

A jury trial resulted in a verdict for \$80 in favor of the plaintiff. Judgment was rendered on the verdict, over the defendant's motion for a new trial.

The only error assigned which is discussed in the brief of appellant's counsel is the overruling of the motion for a new trial. The grounds upon which a new trial was asked were the exclusion of certain testimony offered by the defendant, and certain instructions given to the jury, which are claimed to have been erroneous.

The evidence is in the record, and it clearly discloses the fact that the verdict was based on the item of \$80, alleged to have been lent to the defendant by Leonard.

On the trial, the defendant introduced as a witness George W. Ward, described in the bill of exceptions as a competent witness, and propounded to him this question: "State whether or not Powell Slade paid you any money for Clarence Leonard in his lifetime, and if so, how much and when?" The question was objected to by the plaintiff, on the general ground that it was not competent or proper. The defendant's counsel then advised the court that he proposed to show by the witness, "that the \$80 item of cash loaned, mentioned in the complaint, accrued as follows: That said Ward held a note against Clarence Leonard, deceased, for the sum of \$103, that was due; that Slade lived in the country, and Mr. Leonard was working for him; that Mr. Slade was coming to town, and Mr. Leonard drew a check against his own account in bank at Liberty, making the check payable to Slade, and ordering Slade to draw the amount of the check, \$80, on his (Leonard's) account, and to pay the money so drawn to said Ward: that said Slade

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did draw said sum on said check, and pay the same to said Ward, as requested, and also advanced the residue of the \$103, at Leonard's request, to said Ward, in payment of said note."

We are unable to see any legal ground for the exclusion of this testimony. It was competent, as tending to prove that the \$80 charged against the defendant, as a loan to him, simply passed through his hands as a payment by Leonard on his note held by the witness Ward. The complaint charged that this money was lent to Slade by the deceased. The general denial put this averment in issue, and the defendant was entitled, under it, to introduce evidence in contradiction of the averments of the complaint.

The fact that the first paragraph of the complaint alleged a promise to pay this sum to the plaintiff, after the death of Clarence Leonard, did not, as suggested by appellee's counsel, render the proffered evidence inadmissible. The complaint, to be good, necessarily had to aver an existing indebtedness to support the alleged promise, and the averment of such promise means nothing beyond the promise implied by law to pay a debt that is due.

If, as is argued, an express promise to pay a debt claimed by an administrator to be due to the estate of the decedent would conclude the defendant, in the absence of an answer averring a want of consideration for such promise, it would certainly be essential to prove on the trial that the defendant made the express promise; but there was no such proof in this case.

The defendant also offered to prove by Samuel Tappen, a competent witness, that, shortly before the death of Clarence Leonard, the witness had a conversation with the latter concerning the indebtedness of the defendant to him, in which conversation Leonard stated the amount due him from Slade at a less sum than the amount subsequently paid by Slade to the plaintiff as administratrix.

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This evidence, on the plaintiff's objection, was also rejected. The cause of its rejection does not appear in the record, but in the appellant's brief it is stated that the court held that the admissions or declarations of the deceased were not competent evidence. In this the court erred. "The declarations of an intestate are admissible against his administrator, or any other claiming in his right." 1 Greenl. Evidence, sec. 189; *Wilcox v. Duncan*, 3 Ind. 146; *Bevins v. Cline's Adm'r*, 21 Ind. 37; *Denman v. McMahin*, 37 Ind. 241. The admissions of a former administrator, touching the matter in controversy, are admissible against the administrator *de bonis non*. *Eckert v. Triplett*, 48 Ind. 174. The declarations of an ancestor, that he held the land as tenant of a third person, are admissible to prove the seizin of that person, in an action brought against him by the heir. 1 Greenl. Evidence, sec. 189. So, in an action against heirs for the recovery of real estate, when the statute of limitations is pleaded, it is competent to prove the admissions of the ancestor that he held the same as tenant of the plaintiff, and not as owner. *Vanduyn v. Hepner*, 45 Ind. 589.

The defendant further offered the evidence of Theophilus Parker, a competent witness, to the effect that Clarence Leonard, a short time before his death, stated to the witness that the defendant Slade owed him a balance of only \$140. The court excluded this evidence. This was erroneous. As we have seen, the statements of the decedent as to the indebtedness of the defendant, were competent evidence for the latter. Subsequent to Leonard's death, the defendant paid his administratrix a sum in excess of \$140. This testimony should have gone to the jury, to be considered by them with the other evidence in the cause.

The plaintiff was called as a witness by the defendant, and the latter propounded to her the following questions, among others:

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1. "State whether or not this ledger does or does not contain your husband's accounts during the time from 1875 to the date of his death?"

2. "Did you not make this settlement on the accounts in this book and the account in Slade's book?" (Both books being shown the witness.)

4. "State whether or not these two books were not the same upon which the settlement was based, and contained all accounts settled by you and Mr. Slade?"

The plaintiff's counsel objected severally to these questions. The defendant stated to the court that by them he proposed to elicit the facts that the books in question contained all the dealings between him and the deceased; that said books were before the plaintiff and defendant on April 23d, 1879, and that all matters of account existing between the plaintiff's intestate and the defendant, contained in said books, were settled on that day.

The court held the several questions improper, and the proposed evidence inadmissible.

The defendant was entitled to such evidence as the account book of the plaintiff's intestate might furnish touching the alleged indebtedness. If items were sued for not charged on such book, that was a circumstance proper for the consideration of the jury. The books of the defendant were not admissible to prove any item of set-off or payment, but it was competent for him to introduce both books, with accompanying evidence, that all the items contained therein were included in the settlement of April 23d, 1879.

But we think there was no available error in this ruling of the court. The evidence on behalf of the defendant showed that the item of \$80 was not included in the settlement, and as it is manifest from the whole evidence that the jury found the accounts on both sides fully settled, with the exception of that item, the defendant was not injured by the exclusion of the proposed testimony.

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The defendant offered himself as a witness concerning the matters embraced in his settlement with the plaintiff, but the court held him incompetent to testify. Inasmuch as the judgment must be reversed for the errors already noticed, it is unnecessary for us to decide the abstract question of the right of the defendant, under the statute of 1867, to testify in his own behalf touching his transactions with the plaintiff as administratrix. The new civil code will be in force when the cause is again tried, and this limits the disqualification of parties as witnesses in this class of cases to matters which occurred during the lifetime of the decedent. Acts 1881, p. 290, sec. 276.

We have examined the instructions complained of, and are of the opinion that, on the case as made by the evidence, they were a correct exposition of the law.

For the several errors of the court below, above specified, in excluding proper evidence offered by the defendant, the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, at the costs of the appellee.

No. 7904.

KISTLER *v.* HERETH.

STATUTE OF LIMITATIONS.—*Subsequent Disability.*—The rule is, that when the statute of limitations has once begun to run, no disability subsequently arising will arrest its progress.

SAME.—*Statute Construed.*—Section 215 of the code. 2 R. S. 1876, p. 126, only provides for cases where the plaintiff is under legal disabilities when his cause of action accrues, and authorizes him to bring his action within two years after the disability is removed.

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SAME.—Reply.—Imprisonment.—Legal Disability.—In an action for damages for an assault and battery, the reply to an answer of the statute of limitations, alleged that, shortly after the commission of the injury, and while plaintiff was suffering therefrom, and confined to his room from the effects thereof, and unable to institute a suit therefor, the defendant, conspiring with others, procured, on a criminal charge, the indictment, conviction and incarceration of the plaintiff in the State's prison; that, deducting the time of said imprisonment, the action was commenced within two years after the removal of the disability occasioned by his imprisonment.

Held, that the reply was insufficient on demurrer.

From the Marion Civil Circuit Court.

I. Klingensmith, for appellant.

Howk, C. J.—This was a suit by the appellant to recover damages for an assault and battery, alleged to have been committed upon him by the appellee, on the 5th day of September, 1874. The suit was commenced on the 13th day of July, 1877. To the appellant's complaint the appellee answered in two paragraphs, in substance as follows:

1. A general denial; and,
2. That the cause of action, in appellant's complaint mentioned, did not accrue within two years before the commencement of this suit.

The appellant replied to the second paragraph of answer in two paragraphs, of which the first was a general denial, and the second paragraph stated affirmative matters, by way of reply. The appellee's demurrer, for the want of facts, to the second paragraph of reply, was sustained by the court, and to this ruling the appellant excepted; and upon this ruling judgment was rendered against him for the appellee's costs.

The only error assigned by the appellant, in this court, is the decision of the circuit court in sustaining the appellee's demurrer to the second paragraph of his reply to the second paragraph of answer. In his second reply, the appellant alleged, in substance, that after the commission of the assault and battery, as charged in the complaint, to wit, on the 5th

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day of September, 1874, and while the appellant was suffering therefrom and confined to his room from the effects thereof, and unable to prepare a suit against the appellee for said cause of action, the appellee, conspiring with one Joseph K. Forbes, and others whose names were unknown to the appellant, to have him, the appellant, indicted for the crime commonly called *black-mailing*, and convicted and incarcerated in the State's prison, procured an indictment to be returned against the appellant, and had him arrested on the 19th day of September, 1874, and convicted and sentenced to the State's prison, and confined therein from the 17th of November, 1874, until the 4th day of October, 1875, when he was returned from said prison, and discharged from said indictment and imprisonment; and the appellant averred that, after deducting the time of his said imprisonment, this suit was commenced within two years after the removal of said disability of imprisonment. Wherefore, etc.

It is very clear, we think, that this second reply did not state facts sufficient to constitute a good reply to the appellee's answer, setting up the statute of limitations in bar of the cause of action stated in the complaint. It appeared from the allegations of both his complaint and his second reply, that the appellant's alleged cause of action had accrued on the 5th day of September, 1874, and that this suit thereon was not commenced by him until the 13th day of July, 1877, or nearly three years after the accruing of his said cause of action. In section 211 of the code of 1852, it is provided that actions for injuries to the person, such as the one at bar, shall be commenced within two years after the cause of action has accrued, and not afterward. 2 R. S. 1876, p. 122. Section 215 of the code of 1852, however, provides that "Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed." We quote this section from 2 R. S. 1852, p. 77, as there is a palpable

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misprint of the section, making it difficult to be understood, as it appears in both 2 G. & H., p. 161, and 2 R. S. 1876, p. 126. The section as quoted is re-enacted as section 42 in the civil code of 1881. It was shown by the averments of the second reply that the appellant was imprisoned from the 19th day of September, 1874, until the 4th day of October, 1875, and, while thus imprisoned, he was "under legal disabilities," within the statutory definition of that phrase as given in section 797 of the code of 1852, 2 R. S. 1876, p. 313.

But the defect in the second reply lies in this, as it seems to us, that it wholly fails to show that the appellant, when his cause of action accrued, was under any legal disability of any kind. Section 215 of the code, above quoted, only provides for the case where the plaintiff is under legal disabilities when his cause of action accrues, and authorizes him to "bring his action within two years after the disability is removed." In the case at bar, the appellant's cause of action accrued, as we have seen, on the 5th day of September, 1874, and he was not then, nor for two weeks afterward, so far as his second reply shows, under any legal disability. The statute of limitations began to run against his alleged cause of action from the time it accrued, and had run for two weeks, as shown by the reply, before his arrest and imprisonment. In such a case, the general rule is, that, when the time mentioned in the statute has once begun to run, no disability subsequently arising will arrest its progress. 2 Greenl. Evidence, sec. 439. Thus, in Angell on Limitations, sec. 196, it is said: "The invariable construction, which has been given to the saving, is, that where it is incumbent on the plaintiff to prove that he labored under any disability, he must show, that it was a continuing disability from the first, and that when the statute has once begun to run, no subsequent disability will impede it." There are some statutory exceptions to this general rule, in this State,

McDonough *et al. v. Kane.*

but the case now under consideration does not come within any of these exceptions.

We are of the opinion, therefore, that the court committed no error in sustaining the appellee's demurrer to the appellant's second reply.

The judgment is affirmed, at the appellant's costs.

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No. 7981.

McDONOUGH ET AL. *v. KANE.*

PRACTICE.—Appeal from Justice of the Peace.—Change of Venue.—Costs.—

Where, in an action appealed from a justice of the peace by defendants, a change of venue from the county was granted to plaintiff, a motion by defendants to tax to the plaintiff all the costs accrued in the cause up to the time of granting the change, under the provisions of the justices' act on that subject, 2 R. S. 1876, p. 612, sec. 29, was properly overruled.

SAME.—In such case, upon the costs of the change being paid or replevied, the change should be granted.

SAME.—Pleading.—Written Instrument.—Repugnancy.—Demurrer.—A statement in a pleading inconsistent with the legal effect of a written instrument made a part of such pleading is no cause for demurrer.

SAME.—Two Contracts of Same Substance.—First Merged in Second.—Where two contracts are made part of a pleading, and the one last made embraces the entire substance of the one first made, the first contract will be regarded as merged in the second, and the fact that the merged contract is set forth in the pleading, and treated by the pleader as subsisting, and the real contract treated as a mere recital of the first, does not render the pleading bad on demurrer.

From the Marshall Circuit Court.

J. S. Slick, J. W. Rickel and J. W. Smith, for appellants.

P. O. Jones, M. A. O. Packard and O. M. Packard, for appellee.

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MORRIS, C.—This action was commenced before a justice of the peace of Fulton county, appealed to the circuit court, and finally taken by change of venue to Marshall county.

The complaint is in two paragraphs. The appellants appeared before the justice and filed their demurrer to the first and second paragraphs of the complaint, for the reasons:

“1st. That there is an improper joinder of parties;

“2d. That said complaint does not state facts sufficient to constitute a cause of action.”

This demurrer is not to each paragraph separately, but to both. It was overruled. There was a trial before the justice, and judgment in favor of the plaintiff below.

Upon appeal to the circuit court, Kane filed his affidavit for a change of venue. The affidavit seems to have been filed on the 4th of September, 1877, and change granted. On the next day, the appellants moved the court to tax all the costs that had accrued in the cause, up to the time of granting the change, to the appellee, on the ground that the court should be governed, in granting the change, by the provisions of the justices' act on that subject. The court properly overruled this motion, and ordered that, upon the costs of the change being paid or replevied, the change be granted, as before ordered.

The judge of the Marshall Circuit Court having been engaged as counsel for one of the parties, by their agreement, the Hon. Horace Corbin was appointed to preside as judge during the trial of said cause.

The appellant Doyle filed in the Marshall Circuit Court a demurrer to each paragraph of the complaint, which was overruled. The cause was submitted to a jury for trial, and a verdict returned for the appellee. The appellants filed separate motions for a new trial, on the ground that the verdict was not sustained by the evidence, and was contrary to law, and because the damages were excessive. The motion for a new trial was overruled, and judgment rendered in

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favor of the appellee. The rulings of the court upon the demurrer to the complaint are assigned as error.

The first paragraph of the complaint states that articles of agreement had been entered into between the appellee and the appellant McDonough, a copy of which is filed with and made part of the complaint ; that afterward, on the 10th day of December, 1875, by a writing on the back of a paper containing the substance of said agreement, the appellant Doyle promised and agreed to become jointly responsible with the said McDonough for the due performance of said agreement. Copies of the paper alleged to contain the substance of said agreement, and of the undertaking of Doyle indorsed thereon, were filed with and made part of said paragraph. It is averred that the appellee fully performed his part of the agreement, but that the appellants had failed and refused to perform their part.

By the first contract, which is without date, the appellee agrees to withdraw a suit commenced by him against McDonough before a justice of the peace, and then pending in the Fulton Circuit Court, and pay one-third of the constable and justice's fees. McDonough agreed to pay the other two-thirds. Kane, the appellee, also agreed to withdraw another suit brought before a justice, and then pending in the Fulton Circuit Court, pay half the costs, and \$26 for plowing six acres and sowing the same in wheat. McDonough agreed to pay the other half of the costs in said suit. The parties also mutually agreed to stop all other suits pending or contemplated. McDonough was to have possession of a cabin.

The second paper, filed as a part of this paragraph, purports to have been made between the same parties, and is dated August 30th, 1875. It does not recite nor refer to the former agreement, but purports to be an independent agreement between the appellee and McDonough, embracing the entire substance of the former agreement. The two

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agreements differ as to the amount of costs to be paid by the parties in one of the pending suits mentioned in both; otherwise they are the same.

On this last contract, Doyle endorsed the following statement:

"Whereas the within agreement has not heretofore been performed, by reason of the within named McDonough having failed to give surety for the performance of his part thereof: Now, for the purpose of enforcing the same, I, John Doyle, do hereby become jointly responsible with Bennett McDonough for the full, complete and entire performance of all the covenants and agreements herein contained, to be performed by said McDonough.

"Witness my hand and seal this 10th day of December, 1875.

"JOHN ^{his} X DOYLE.
mark.

"Attest: J. S SLICK."

It is alleged in this paragraph of the complaint, that the appellee had been compelled to pay costs which McDonough agreed to pay, and had sustained damages in the sum of \$182.19. The manner in which the plaintiff below refers to the several agreements which are made part of the first paragraph of his complaint leaves it quite doubtful whether or not, upon his construction, Doyle is shown to be liable. But, as all the agreements are made a part of the pleading, the court will not be bound by the construction thus given to the contracts, but will give them such meaning as, in its opinion, the law will authorize. As the contract between the appellee and McDonough, of the date of August 30th, 1875, was the last made between them, and as it embraces the entire substance of the former contract, with some variations, the first contract must be held to be merged in the second. The first could not be performed without violating some of the terms of the second. The latter must, therefore, be regarded as the only contract set out in the first paragraph of the complaint. Nor will the pleading, if otherwise good, be rendered invalid

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by the fact that a copy of the merged contract is set forth as a part of it, treated by the pleader as a subsisting contract, and the real contract treated as a mere recital of the first. These statements are, it is true, repugnant to the meaning of the papers filed with and made part of the paragraph. But a statement in a pleading, inconsistent with the legal effect of a writing made a part of such pleading, is no cause for demurrer. *Forst v. Elston*, 13 Ind. 482.

Upon the back of the second contract, Doyle writes: "Whereas the within agreement has not heretofore been performed, by reason of the within named McDonough having failed to give surety for the performance of his part thereof." McDonough could not have failed, as stated by Doyle, to give surety, unless by the agreement and understanding between him and Kane at the time the contract of August 30th, 1875, was signed by them, he had agreed to procure such security. The above language of Doyle clearly implies that McDonough was to procure surety before the contract should become binding. And his subsequent language strengthens and renders this implication certain. He adds: "Now, for the purpose of enforcing the same," (the contract) "I, John Doyle, do hereby become jointly responsible with Bennett McDonough," etc. It was, according to the clear implication and meaning of his language, his signature that consummated the contract, and rendered it binding upon Kane and McDonough. The agreement of Kane, binding him to do the things mentioned in the contract, was the consideration for the undertaking of Doyle, and quite sufficient.

We think the court did not err in overruling the demurrer to the first paragraph of the complaint.

The second paragraph of the complaint is upon the contract of the date of August the 30th, 1875, and the undertaking endorsed thereon by Doyle. It is the same as we

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have held the first to be. The demurrer to it was, therefore, properly overruled.

This disposes of the questions discussed by counsel. We think the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 8178.

BASH ET AL. v. VAN OSDOL ET AL., ADMINISTRATORS.

PRACTICE.—Default.—Motion to Relieve from Judgment.—Excusable Neglect, When not Shown.—A motion to set aside a default and relieve from a judgment, under section 99, 2 R. S. 1876, p. 82, showing by affidavits that the default was taken November 6th, 1878, and that, on the fourth and fifth days of that month, the party and counsel had answers ready to be filed on call of the cause, but making no reference to the sixth, when the default was entered and the judgment was rendered, does not make a case of “excusable neglect.”

SAME.—Amendment of Complaint After Default and Judgment.—In such case, after default and judgment on a statutory arbitration bond, it was error for the court to permit the plaintiffs to amend their complaint by inserting the amount for which the award was confirmed and judgment thereon rendered.

SAME.—Defaulted Defendant.—Damages.—Right to Trial and Exceptions.—A defaulted defendant can not controvert anything except damages. He may demand a trial by jury, cross-examine plaintiff’s witnesses, introduce evidence in mitigation, ask instructions as to the measure of damages, move for a new trial, and reserve exceptions.

SAME.—Statutory Arbitration Bond. — Pleading. — Complaint. — Necessary Averments.—An action on a statutory arbitration bond can not be maintained until the award has been properly confirmed. In such an action, it must be averred that, in a proper proceeding for that purpose, the award of the arbitrators has been confirmed by the judgment of the proper court.

From the Huntington Circuit Court.

Bash *et al.* v. Van Osdol *et al.*, Administrators.

J. B. Kenner, L. P. Milligan and H. B. Sayler, for appellants.

B. F. Ibach and W. H. Trammel, for appellees.

BICKNELL, C. C.—The appellees, as administrators of Robert Shroyer, brought this action against the appellants on a statutory arbitration bond; see 2 R. S. 1876, p. 317. The appellants, although personally served with summons, failed to appear; judgment by default was rendered against them on November 6th, 1878, for one thousand dollars and costs.

On November 9th, 1878, the appellants filed two affidavits, and moved thereon that the default and judgment be set aside, and that they be permitted to appear and file answers to the complaint. This motion was taken under advisement by the court; the cause was continued for three terms successively, and on the 20th of June, 1879, the motion was overruled. The appellants appealed from the judgment. Their bill of exceptions No. 1 shows the motion, the affidavits, and the proposed answers to the complaint.

Their bill of exceptions No. 2 shows that, when the judgment was rendered, the appellees' complaint, after reciting the submission and the bond, and the making of the award for \$1,701.03, in favor of Robert Shroyer and against the appellants, concluded as follows: "That said award was made a rule of court of said circuit court, and judgment rendered thereon in the sum of _____; they further say that said Bash and Bash did not carry out their agreement, and did not abide by and perform the award made as therein stated; that they did not pay the said sum of \$1,701.03, or any part thereof, and that the judgment rendered on said award is wholly unpaid. Wherefore they demand judgment in the sum of \$2,000, and all proper relief."

Said bill of exceptions No. 2 further shows that, on December 30th, 1878, at the next term of the court after the term in which the judgment was rendered, and while the motion to set aside the default and judgment was pending,

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the court, over the objection of the appellants, who were still appearing on said motion, permitted the appellees to amend their complaint, by filling up the blank after the words "and judgment rendered thereon in the sum of" with the words "two thousand sixty-four and $\frac{67}{100}$ dollars," to which the appellants at the time excepted. The appellants assign the following errors:

1st. The court erred in overruling the motion of appellants to set aside the default and judgment.

2d. The court erred in permitting the appellees to amend their complaint in the term of court next after judgment had been rendered and signed.

3d. The court erred in rendering judgment upon a complaint which did not state facts sufficient on which to base a judgment or make a cause of action.

As to the first error assigned, the motion to set aside the default and judgment was made under section 99 of the practice act, which authorizes the court to "relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect." The ground of the motion seems to have been "excusable neglect." The default was taken and the judgment was rendered on November 6th, 1878. The affidavit of appellants' attorney shows that he intended to file answers in the case, and had his answers prepared, but his affidavit makes no reference to November 6th; it states that, "on the morning of the 5th day of November, when affiant was absent for only a few minutes, on other business, and at a time when affiant did not expect any cases would be called, as affiant believes that a jury case was proceeding, and that he could with safety leave the room for a short time; affiant says that he was ready to answer said complaint; that he expected to do so on the first call, as by a rule of this court answers are due the morning after the day for which the party is summoned to appear, and was watching for said call, but did not hear

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it called, and was informed the next day that the cause had been called in his absence, and a default taken." The foregoing is all that the affidavit contains on the subject of excusable neglect. It is confined to what the attorney expected to do on the day before the default was taken. The truth of it in no way conflicts with the proper taking of the default on the following day; but further, the affidavit, instead of stating that defendants have a meritorious defence to the action, proceeds as follows: "Affiant says the plaintiff has a good and meritorious cause of action, to wit, etc." The affidavit of Henry Bash, one of the appellants, was also filed in support of said motion. This affidavit states that affiant employed said attorney, and that appellants' answers were prepared; that he is informed and believes that said attorney "had said answers ready on the morning of the 4th of November, that being the first day on which a default could be taken, but that, during a temporary absence of said attorney, the case was called, default taken, and judgment rendered thereon." There is nothing in either of the affidavits which refers to the day on which the default was taken, or which offers any excuse for the absence of the attorney on that day. The court committed no error in overruling the appellants' motion to set aside the default and judgment.

The second error assigned raises two questions: 1st. Was it right to permit the amendment of the complaint after the close of the term at which judgment was rendered? 2d. If such amendment was improper, could the appellants, being in default, take advantage of the error?

It was held in *Maxwell v. Day*, 45 Ind. 509, that pleadings can not be amended after the jury has retired, or after submission of a cause to the court. In *Heddens v. Younglove, Massey & Co.*, 46 Ind. 212, it appeared by bill of exceptions that twenty days after verdict, and pending a motion for a new trial, the court permitted the plaintiff to amend his complaint by averring a demand before suit brought, when with-

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out that averment the complaint was fatally defective; it was held that such an amendment could not be permitted after the trial, and this court said: "We can not regard the amendment as constituting a part of the complaint." In *May v. The State Bank*, 9 Ind. 233, it was held that, after default, the sum claimed in the declaration could not be increased by amendment, because the default admits indebtedness not exceeding the amount claimed.

It appears, from these authorities, that the court below erred in permitting the appellees, after the close of the term at which judgment was rendered, to amend their complaint by inserting the amount for which the award was confirmed and judgment thereon rendered. The appellants, being in default, could not take advantage of this error unless it affected the question of damages. A defaulted defendant can not controvert anything except damages. In *Briggs v. Snelghan*, 45 Ind. 14, it was held that a defaulted defendant may demand a trial by jury; he may cross-examine plaintiff's witnesses, and may introduce his own witnesses in mitigation of damages; he may ask instructions as to the measure of damages; he may move for a new trial; he may reserve by bill of exceptions any question affecting the damages; but he can not introduce a substantive defence, although he may show that plaintiff is entitled to nominal damages only. The amendment in this case had a direct bearing on the question of damages. It was held, in *Shroyer v. Bash*, 57 Ind. 349, that, in an action on a statutory arbitration bond, the measure of damages is the judgment of the proper court on the award, with interest and costs, not exceeding the amount of the bond. Where such a judgment is rendered for one cent, or without specifying any amount, only nominal damages can be recovered. The appellants, therefore, had a right to raise this question by bill of exceptions, and the amendment now under consideration can not be regarded as a part of the appellees' complaint.

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The third error assigned is, substantially, that the complaint did not state facts sufficient to constitute a cause of action. In Indiana, a statutory award is regarded as imperfect and incomplete until confirmed by the proper court, in a proper proceeding. An action can not be maintained on a statutory arbitration bond until the award has been properly confirmed. *Shroyer v. Bash*, 57 Ind. 349. In such an action it must be averred that, in a proper proceeding for that purpose, the award of the arbitrators has been confirmed by the judgment of the proper court. *Shroyer v. Bash, supra*; *Healy v. Isaacs*, 73 Ind. 226. It follows, from these decisions, that the complaint in the case at bar did not state facts sufficient to constitute a cause of action. The judgment of the court below ought to be reversed, and the cause remanded for further proceedings, in conformity with this opinion.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, at the costs of the appellees, and this cause is remanded for further proceedings, in accordance with said opinion.

No. 6963.

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75	191
140	303

75	191
1167	133

TRESPASS.—*Service of Writ of Possession.*—*Pleading.*—*Complaint.*—*Answer.*—*Reply.*—*Departure.*—*Practice.*—Where a complaint contains facts constituting a cause of action against defendants for trespass in removing plaintiff's goods from his dwelling-house, and two of the defendants answer in justification under a writ of possession, a reply seeking to hold them responsible and recover damages for issuing the writ, but not showing that they had anything to do with issuing it, or with the trespass, etc., is a departure, and is insufficient on demurrer. In such reply, the plaintiff could not controvert his landlord's title.

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SAME.—*Practice.—Instructions.—Exemplary and Nominal Damages.*—In such an action an instruction, that “If the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict for nominal damages,” assumed that a trespass had been committed, and was erroneous.

SAME.—*Compensatory Damages.—Measure of Recovery.*—In such action, an instruction, that “The amount of damages that the plaintiff is entitled to recover is not fixed by law, but left to your sound judgment and discretion,” was erroneous. In an action for trespass where only compensatory damages can be allowed, the measure of recovery is limited to the amount of the damages done or the injury inflicted.

SAME.—*Justification under Writ.—Facts Assumed as Proved.—Actual Damage.*—On trial of such an action, it was error to instruct the jury that the judgment and writ of possession did not justify the acts complained of, and that when they had assessed the injury to plaintiff they should go no further to visit defendants with exemplary damages. It was error to assume that a trespass had been committed, and that plaintiff had sustained injury.

SAME.—*Instructions Refused.—Objections to Evidence.—Supreme Court.—Practice.*—Instructions applicable to the evidence and stating the law correctly should be given, as requested by the defendants; but where the plaintiff, as appellee, has not appeared and furnished aid in support of his judgment, and sufficient errors have been made manifest upon the record to require a reversal, the Supreme Court will not recite all the instructions improperly refused, or undertake, at appellant's request, to decide all the questions presented as to instructions and objections to evidence.

From the Henry Circuit Court.

W. R. Hough and W. March, for appellants.

FRANKLIN, C. —This is an action of trespass, brought by Davis against Steele, Barnett, Thomas, Offutt and Rarden. The suit was commenced in the Hancock Circuit Court in October, 1867. The venue was changed to Wayne county in 1868, transferred back to Hancock in 1869, changed again to Delaware county in 1869, and again changed to Henry county in 1874, and finally tried in the Henry Circuit Court in 1876. The services of six or eight circuit judges, a number of common pleas judges, and several members of the bar, from time to time, have been brought into requisition to settle the various questions in the court below.

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The plaintiff, in his complaint, charged the defendants with having forcibly and unlawfully entered his premises and dwelling-house, and removed a portion of his personal goods.

The defendants answered by a denial and two special paragraphs in justification, in which they alleged that Steele had obtained before Barnett, as a justice of the peace, a judgment for the possession of the premises; a writ of possession was issued; that Thomas, as special constable, had said writ, and called to his assistance, in the service thereof, Offutt and Rariden; that the alleged trespass was committed in the attempted service of said writ, and that no unnecessary damage or injury was committed in said attempt, nor any harm or wrong done to the plaintiff.

The plaintiff replied by a denial and a special paragraph. Separate demurrers of Steele and Barnett were filed to the special paragraph, and overruled. This paragraph only applied to Steele and Barnett.

Trial by jury; finding for plaintiff. Motion for a new trial overruled, and judgment for plaintiff.

The errors complained of are the overruling of the demurser to the second paragraph of the reply, and the overruling of the motion for a new trial.

Offutt died before the cause was tried, and there was a dismissal as to Offutt and Rariden. Under the directions of the court, the jury found a verdict for Barnett; and that leaves Steele and Thomas to prosecute this appeal.

The second paragraph of the reply is too long to copy in this opinion; the substance of it is as follows:

That, as to Steele and Barnett, the premises upon which the trespasses were alleged to have been committed were the property of the plaintiff, and that he was in the rightful possession thereof; that, by fraud, falsehood and deceit, said Steele had obtained a deed for the same; that there was then pending in the Hancock Circuit Court a suit

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by plaintiff against Steele, to set aside said deed, and quiet his title to the land, which facts were well known by Steele and Barnett; that he admitted the suit of Steele against him before Barnett, and the judgment for possession, but alleged that the trial was had on the 2d day of October, 1867; that he had then informed Barnett that, if the case was decided against him, he wanted to appeal it to the circuit court; that Barnett informed him that he would take the case under advisement until the next day; that he then gave notice to Barnett and Steele that, if the case was decided against him, he intended to appeal it; that he returned next morning at 6:30 o'clock A. M., but was unable to find Barnett, by searching for him, until about 9 o'clock A. M., when he was informed by Barnett that the case was decided against him, and that a writ for possession had been issued, and that Steele, with a deputy constable and posse was then gone to turn him out of possession; that plaintiff then filed his appeal bond; that the promises of said Steele and Barnett were false and fraudulent, and made for the fraudulent purpose of getting said plaintiff turned out of possession, before he could perfect his appeal; that the writ for possession was void; that the several grievances mentioned in his complaint were committed, and that said paragraphs of said answer do not constitute a bar to said plaintiff's right to recover.

This reply was filed to answers setting up as a justification the writ for possession issued upon a judgment rendered in an action brought by Steele against Davis, upon a lease executed by Davis to Steele for the premises in controversy, in 1863, as the tenant of Steele. Davis could not be permitted to controvert the title of his landlord in this way. He attempted to set up the same defence before the justice of the peace in the action on the lease, but before the trial the record shows that he abandoned this defence, and went to trial upon the general issue. This lease has been incidentally passed upon by this court in the case of *Steele v.*

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Moore, 54 Ind. 52 ; and, according to the opinion in that case, this reply falls far short of a sufficient attack upon the lease. The reply does not show that Steele or Barnett had anything to do with the commission of the alleged trespass ; and to attempt, in the reply, to hold them responsible and recover damages for issuing the writ of possession, would be a departure from the complaint.

There is nothing in the reply showing that Steele was present the next day, or had anything to do with the issuing of the writ, and it does not controvert the fact as to whether the writ had been issued the next day in pursuance of what Barnett had told as to when the case would be decided. It was entirely deficient as a reply to defendant's answers ; and the demurrers should have been sustained to it.

In the motion for a new trial, appellant's counsel filed sixty-two reasons therefor, the last of which embraces twenty-six instructions, asked by defendants, and refused by the court ; other reasons embrace the instructions given. The following instruction was asked by plaintiff, given by the court, and excepted to by defendants :

“If you find for the plaintiff, you will then determine the amount of his damages. The amount of damages that the plaintiff is entitled to recover is not fixed by law, but left to your sound judgment and discretion. And, in determining the amount of damages, you must take into consideration all the circumstances under which the trespass was committed. And if the evidence shows that malice, insult or deliberate oppression was exercised by the defendants toward the plaintiff in the commission of the acts complained of, then you may award, in addition to the actual loss sustained by plaintiff, such exemplary damages in addition, as shall tend to prevent a repetition of such injury.” To which the court added. “If the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict for nominal damages.”

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This instruction assumes that a trespass was committed, and the jury is told that they must find for the plaintiff nominal damages, although he had sustained no injury. This was wrong. The clause in relation to the amount of damages we also think erroneous. In the action for trespass, where only compensatory damages can be allowed, the amount is as much fixed by law as is the amount in an action on contract for services rendered or goods sold and delivered, where no price is agreed upon, and the measure of recovery is as strictly limited to the amount of the damage done or the injury inflicted. If the instruction, so far as this clause is concerned, had only applied to the punitive damages that might have been added, this might have been correct, but it is not correct when applied to compensatory damages.

The following was the third instruction given : "In addition to the general denial, the defendants answer that whatever acts were done by them, complained of in the complaint, were done under and by virtue of a writ of possession, issued by Barnett, a justice of the peace, to said Thomas, special constable, upon a judgment duly rendered by said justice in an action of John Steele against said David F. Davis, and that, in the execution of said writ, the defendants did no more violence nor injury than was necessary to the execution of said writ. The judgment and writ have been read to you in evidence. As to whether they justify the acts complained of, is not for the jury to say, but is a question of law for the court to determine; and I say to you, that they did not justify the acts complained of by the plaintiff as the alleged trespass. If John Steele, in good faith, believing himself to be entitled to the possession of the farm upon which Davis resided, brought suit before Esquire Barnett, against Davis, to recover the possession of said farm, and obtained the judgment given in evidence, and the defendant Thomas, in good faith, believing that he was executing legal process, received the writ in evidence, and

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he and Steele did whatever it is proven they did do of the acts complained of, under and by virtue of said writ, in good faith believing they were following the law, then they should not be visited with exemplary damages; but, after you have assesssd the injury to Davis, by reason of the defendants entering his premises and removing his goods, you should go no further," etc.

We think this instruction was based upon a wrong theory of the case; that the conclusion therein does not correctly follow the premises in either of the clauses of the instruction. In the first clause, that the writ did not justify the acts done under and by virtue of it, was erroneous; and in the second clause, that they should go no further after assessing Davis' injury, was assuming that a trespass had been committed, that Davis had sustained injury, and that the jury should assess such damages anyhow, which was wrong.

Densmore v. The State, 67 Ind. 306.

Among the instructions asked by the defendants, and refused by the court, are the following:

"7. If the jury further believes, from the evidence, that the defendant Steele did no other acts in connection with the trespass charged in the complaint, except to bring an action before a justice of the peace for the possession of the tract of land on which the house described in the complaint is situated, as landlord, against David F. Davis, as his tenant, and prosecute the action to judgment, procure a wrjt of possession to be issued thereon, and placed in the hands of a special constable for service, and to be present in the public highway, ready to receive the possession when it should be given to him by the constable, he can not be made liable in this action.

"11. If the jury believe, from the evidence, that one of the defendants, George Barnett, a justice of the peace, of Hancock county, Indiana, in an action pending before him between the plaintiff, Davis, and the defendant Steele, hav-

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ing jurisdiction of the action and the parties, rendered judgment against Davis and in favor of Steele, giving possession of the premises described in the complaint to Steele, and issued a writ thereon, regular upon its face, directed to the defendant, Thomas by name, as special constable, commanding him to deliver said premises to said Steele, by removing Davis therefrom ; that said justice appointed said Thomas as such constable, and noted said appointment upon his docket ; that said Thomas called to his assistance in the service of said writ the defendants Offutt and Rariden ; and if the jury further believe, from the evidence, that all the trespasses complained of in this action were committed by said defendants Thomas, Offutt and Rariden, in the execution of said writ, and they used or did in the execution of said writ no more or greater violence or harm than was necessary for a proper execution of the writ, said defendants are not liable in this action, and the jury should find for the defendant Thomas."

These two instructions, we think, stated the law correctly, were applicable to the evidence, and should have been given to the jury.

There were other instructions asked and refused, that perhaps ought to have been given, but we deem it unnecessary to extend this opinion by copying them.

Counsel for appellant have especially requested this court to decide all the questions presented in the record.

As appellee's counsel seemed to have exhausted all their energies and resources in this case before it reached this court, and have not entered an appearance here or furnished us with any information or assistance on their side, we are unwilling to undertake the herculean task of deciding all the questions raised in the record by appellant's counsel, or in this opinion to write a book on evidence by discussing the fifty-eight objections made to the admissibility of testimony in the trial of the cause.

Pierce v. The State.

We have pointed out sufficient errors to reverse the judgment, and in all subsequent proceedings counsel can examine the text-books for authority upon the questions as they arise.

PER CURIAM.—It is, therefore, ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, at costs of appellee; and that the cause be remanded to the court below, with instructions to grant the defendants a new trial, to sustain the demurrer to the second paragraph of the appellee's reply, and for further proceedings in accordance with this opinion.

No. 9377.

PIERCE v. THE STATE.

CRIMINAL LAW.—Indictment.—Malice.—Assault and Battery with Intent to Murder.—Where, in an indictment for an assault and battery with intent to commit murder, there is a defect in the spelling and in the construction of the word formed by the letters and characters probably intended for the word "malice," and it is evident that such word represents and stands for the word "malice," wherever it occurs in the indictment, it ought to be so read and construed.

SAME.—Voluntary Manslaughter.—Where such offence is not charged to have been committed with malice, the indictment may still be sufficient, on motion to quash, as a charge for an assault and battery with intent to commit voluntary manslaughter.

SAME.—Verdict.—Judgment.—Where, upon the trial of such indictment, the defendant was found "guilty as charged in the indictment," the indictment is sufficient to sustain both the verdict and judgment, whether considered as charging an intent to commit murder, or only an intent to commit voluntary manslaughter.

SAME.—Practice.—Bill of Exceptions.—Supreme Court.—Where a bill of exceptions containing the evidence is not filed within the time given therefor by the trial court, it is not properly in the record, and will not be considered by the Supreme Court.

From the Randolph Circuit Court.

Pierce v. The State.

S. Colgrove and D. M. Bradbury, for appellant.

D. P. Baldwin, Attorney General, J. E. Mellett, Prosecuting Attorney, and J W. Newton, for the State.

NIBLACK, J.—The indictment in this case, as it is copied into the record, charged Charles Pierce, the appellant, with having unlawfully, feloniously, wilfully, purposely, and with premeditated malice, made an assault on one Samuel C. Engle, and having, in like manner, beat, bruised, and wounded the said Engle, by shooting him with a pistol, with intent to kill and murder him, the said Engle. A motion to quash the indictment was overruled. A jury returned a verdict of guilty as charged, fixing the punishment at a fine of twenty-five dollars and imprisonment in the State's prison for the term of two years. After denying a motion for a new trial, the court rendered judgment against the appellant upon the verdict.

Error is assigned upon the overruling of the motion to quash the indictment, and upon the refusal of the court to grant a new trial.

The objection to the indictment is that the letters and characters used to form the word probably intended to be known as, and to stand for, "malice," do not spell and constitute the word "malice," and that in consequence the indictment does not contain a good charge of an intention to commit murder in any degree.

To obviate any question which might arise upon an attempted *fac simile* of the letters and characters used as above, the original indictment has, by agreement of parties, been placed before us, and substituted for the copy in the record. While there is a defect in the spelling, and in the construction, of the word formed by the letters and characters above referred to, that word evidently represents, and stands for, the word "malice," wherever it occurs in the indictment, and ought to be so read and construed. This

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construction is made obvious by the relations of this word to the accompanying words and phrases in the indictment.

But, conceding the appellant's claim, that the offence is not charged to have been committed with "malice," the indictment is still sufficient as a charge for an assault and battery with intent to commit voluntary manslaughter. *The State v. Throckmorton*, 53 Ind. 354. As the indictment well charged an indictable offence, the motion to quash it was correctly overruled.

In support of the error assigned upon the overruling of the motion for a new trial, the appellant endeavors to raise several questions upon the evidence. The evidence, however, is not properly in the record.

Judgment was rendered upon the verdict on the 14th day of December, 1880, and fifty days' time from that day was given to the appellant in which to prepare and file a bill of exceptions. The bill of exceptions, copied into the record, was not filed until the 5th day of February, 1881, which was more than fifty days from the date of the judgment. In legal contemplation, therefore, the evidence is not before us, and no question is presented here upon it.

The appellant was found guilty as charged in the indictment; consequently, whether considered as charging an intent to commit murder or only an intent to commit voluntary manslaughter, the indictment was sufficient to sustain both the verdict and the judgment. No cause has been shown for a reversal of the judgment.

The judgment is affirmed, with costs.

Hackleman et al. v. Goodman.

No. 7984.

HACKLEMAN ET AL. v. GOODMAN.

CHATTEL MORTGAGE.—Release of Equity of Redemption.—A mortgagor may release his equity of redemption to the mortgagee at any time after the original transaction; but such release will be closely scrutinized by the courts, and the fairness of the transaction, and the value received by the mortgagor, must be shown by clear and satisfactory evidence.

SAME.—Possession of Mortgagee not Absolute.—Equity of Redemption May be Sold.—A mortgagee takes his mortgage subject to the provisions of the statute, that the equity of redemption in goods and chattels may be levied upon and sold on execution, and, as long as the equity exists, his possession is subject to this right in favor of creditors of the mortgagor.

SAME.—He who takes a chattel mortgage impliedly assents to the temporary interruption of his possession, for the purpose of disposing of the equity of redemption.

SAME.—Evidence, Insufficiency of to Sustain Finding.—Where a mortgagor of growing wheat, upon its ripening for harvest, was employed by the mortgagee to cut the wheat and put it in stack, and did so, but no price was fixed upon the wheat nor allowance made for the price of his labor, and no part of the debt was extinguished, and while in the stack the wheat was levied on by the sheriff, by virtue of executions issued on judgments against the mortgagor, the evidence fails to sustain the findings that the equity of redemption had been extinguished, and that the sheriff's possession and sale were not lawful.

From the Fayette Circuit Court.

C. Merrill and R. Conner, for appellants.

T. M. Little and J. I. Little, for appellee.

MORRIS, C.—This action was brought to recover the possession of one-half of thirty-two acres of wheat, in rick on the Petty farm, in Fayette county.

The appellants answered the complaint by a general denial. The cause was submitted to the court. Finding for the appellee. The appellants moved for a new trial on the ground that the finding of the court was contrary to the evidence. The motion was overruled. The evidence is made part of the record by a bill of exceptions.

The error assigned is, that the court erred in overruling the appellants' motion for a new trial.

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It appears, from the evidence, that on the 6th day of December, 1877, one Simon Ostheimer, who was the owner of the wheat in controversy, then growing upon the ground, executed a chattel mortgage on the same, conveying it to the appellee to secure the payment of two notes, one dated January 1st, 1876, calling for \$264.75, due one day from date; the other dated January 1st, 1877, calling for \$138, and due two years from date, both executed by Ostheimer, and payable to the appellee. In January, 1878, Ostheimer told the appellee, when asked to pay the notes, that he had no money, and would have to turn over to appellee the wheat. The appellee agreed to take the wheat, sell it, and apply the proceeds upon the notes and mortgage. In July, 1878, Ostheimer again saw the appellee, told him the wheat was getting ripe; asked him if he would cut it. The appellee told him that he had no time to cut the wheat; that he, Ostheimer, should cut it and put it in rick, and he would allow him on account what his labor was worth. Ostheimer agreed to this, cut the wheat, and put it in stack. There was no price put upon the wheat, nor is it shown that the appellee ever had any settlement with Ostheimer by which the price of his labor, in caring for the wheat, was fixed.

It was admitted that the appellant and his partner, Thomas, had obtained a judgment in the Fayette Circuit Court, on the 1st day of January, 1878, against said Ostheimer for \$504; that an execution, in due form, was issued on this judgment, directed to the appellant Ball, as sheriff of Fayette county, who, on the 20th day of August, 1878, levied the same on the wheat in controversy, then in stack on the Petty farm; that he duly advertised the wheat for sale, and on the 2d day of September, 1878, by virtue of said execution, sold the same to appellants Hackleman and Thomas for \$145. It appears, from the evidence, that the appellee attended the sale, and gave due notice of his claim to the purchasers. He also says that he demanded the possession of the wheat be-

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fore commencing this suit. Smith, the attorney of the appellee, attended the sale, and told those present that whoever purchased the wheat would buy it subject to the appellee's mortgage. About a month after the sale, the appellants, Hackleman and Thomas, threshed and sold the wheat. After paying for the threshing, there was about 250 bushels, worth eighty-five cents per bushel. The mortgage was duly recorded in Fayette county within the time required by law.

The question involved in this case, as presented upon the evidence, is, had Ostheimer, at the time the levy was made, August the 20th, 1878, an equity of redemption in the wheat in controversy? If he had, then the levy upon the wheat was lawful, and the sheriff's possession of it at the time of the commencement of this suit, August the 28th, 1878, was not unlawful. *Olds v. Andrews*, 66 Ind. 147; *Mobley v. Letts*, 61 Ind. 11; *Sidener v. Bible*, 43 Ind. 230; *Landers v. George*, 49 Ind. 309. The statute provides that the mortgagor's equity of redemption in goods and chattels may be levied upon and sold on execution. The mortgagee takes his mortgage subject to this provision of the statute, and as long as this equity exists, though he may have possession of the goods, his possession is subject to this right in favor of the creditors of the mortgagor, and his possession may be temporarily interrupted for the purpose of disposing of the equity of redemption. He who takes a chattel mortgage, impliedly assents to such interruption of his possession. In the case of *Sparks v. Compton*, 70 Ind. 393, the sheriff had, by sec. 469, 2 R. S. 1876, p. 218, the right to the possession of the mortgaged chattels, as against the mortgagee, for the purpose of levy and sale. Herman says, "where the mortgagor, in accordance with the terms of the instrument, delivers possession of the property to the mortgagee after breach of condition, it will not vest the absolute ownership in the mortgagee or free it from the mortgagor's right of redemption, and therefore until the mortgagee, by legal

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notice and sale of the goods, or by a judicial foreclosure and sale of them, cuts off the equity of redemption, it is liable to seizure and sale by the creditors of the mortgagor.” Herman Chattel Mortgages, 461.

It is insisted by the appellee that Ostheimer’s equity of redemption had been extinguished ; that his statements that he could not pay, that he would have to turn over the wheat to the appellee, that the latter should take it, sell it, and apply the proceeds upon the debt, amounted to a release of the equity of redemption.

“A mortgagor,” says Herman, p. 44, “may release his equity of redemption to the mortgagee at any time subsequent to the original transaction. Such releases will be closely scrutinized by courts ; the fairness of the transaction, and the value received by the mortgagor, must be shown by clear and satisfactory evidence.” In the case of *Holridge v. Gillespie*, 2 Johns. Ch. 30, the Chancellor says : “The general principle is, ‘once a mortgage, always a mortgage ;’ and though, no doubt, the equity of redemption may be released upon fair terms, yet the fairness and value must distinctly appear.”

No price was agreed upon ; no part of the debt was extinguished. The mortgage and its breach entitled the appellee to the possession of the wheat, and gave him the right to sell. The statements made to the appellee by Ostheimer, that he must turn over the wheat, that the appellee should sell it and apply the proceeds upon the debt, gave him no additional right, and, until such sale should be made, the right of redemption continued. The arrangement was simply an assent, on the part of Ostheimer, to the assertion and exercise by the appellee of his rights as mortgagee. And this view is strengthened by the subsequent conversation between the parties. Ostheimer tells the appellee that the wheat is ripening, and asks him if he intends to cut it. The appellee replied that he had no time to do so ; that Ostheimer should

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cut it, and he would credit him for his labor. This conversation tends very strongly to show that Ostheimer was, in his judgment and in that of the appellee, still interested in the wheat. It was he, not the appellee, that seemed to be interested in, and giving attention to, the mortgaged property. No one would doubt, we think, that a tender of the debt at that time to the appellee would have discharged the mortgage. "No waiver or renunciation by a mortgagor of the right of redemption, however express, will be allowed to impair his power of exercising it himself, or transferring it to another." Herman Chattel Mortgages, p. 43. The most that can be said of the conversations between the appellee and Ostheimer is, that they imply a purpose on the part of the mortgagor to waive his right of redemption. The mortgage still existed, and the right of redemption, as its inseparable incident, continued also.

The appellee insists, that, as the mortgage debt exceeds the value of the wheat, the transaction was fair. But the question is, did the mortgagor in fact release his equity of redemption? not what he might fairly have done. The mortgage covered other property—600 bushels of corn in rail pens at the time. No part of the mortgage debt was extinguished. We would gladly reach the conclusion, if we could, that Ostheimer's right of redemption had been extinguished. It would probably save litigation and expense, and result in no injustice to any one. But we are unable to avoid the conclusion, that at the time the sheriff levied upon the wheat, and at the time this suit was commenced, Ostheimer had an equity of redemption in the wheat.

We think the court erred in overruling the appellants' motion for a new trial, and that, for this error, the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

Wood *et al.* v. Crane.

No. 7422.

WOOD ET AL. v. CRANE.

PRACTICE.—Pleading.—Demurrer.—Denial.—Presumption.—Evidence.

75	207
132	317
75	207
138	67

Where a demurrer is sustained to a paragraph of answer, under which no evidence is admissible nor relief attainable, of which the defendant could not have had the benefit under the general denial pleaded therewith, it will be presumed, on appeal, that he did have such benefit under such denial.

SAME.—New Trial.—Bill of Exceptions.—Record.—Supreme Court.—Affidavits in support of a motion for a new trial, copied into the transcript, but not made a part of the record, either by an order of the court or by a bill of exceptions, will not be considered by the Supreme Court.

From the Miami Circuit Court.

J. L. Farrar, J. Farrar, H. Shirk, J. Mitchell and R. P. Effinger, for appellants.

J. M. Brown, L. Walker and C. M. Cole, for appellee.

Woods, J.—It is claimed that the circuit court erred in sustaining the demurrer to the fifth answer, and in overruling the motion of the appellants for a new trial.

The fifth paragraph of answer, which was duly verified, was to the effect that the several supposed promises and undertakings in the complaint mentioned, if any such were made, each and all were made by the defendants, not to the plaintiff, William B. Crane, but to William B. Crane and Calvin Crane, as partners, and that said Calvin is alive and a resident of the county. Wherefore, etc.

The fourth paragraph of the answer was a general denial, which put in issue the averment of the complaint, that the alleged promises and undertakings were made to the plaintiff. There was, therefore, no evidence admissible nor relief attainable under the plea in abatement, of which the appellants could not have had, and, it is to be presumed, did have, the benefit under the general denial. This was so at common law, as well as under the code. 1 Chitty's Pleadings, side page 13, and notes.

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The motion for a new trial is based on the alleged misconduct of the plaintiff, and surprise of the defendants, in a number of specified particulars, and upon the alleged discovery of new evidence. In apparent support of the motion, certain affidavits have been copied into the transcript, and also counter affidavits on the same subject, but these affidavits are not made a part of the record, either by an order of the court or by a bill of exceptions, and are therefore not properly before us. *McDaniel v. Mattingly*, 72 Ind. 349; *Elbert v. Hoby*, 73 Ind. 111.

There is in the record sufficient evidence to sustain the verdict, and we are not able to say, on the proofs made, that the amount of the recovery is too great.

The judgment is affirmed, with costs.

No. 7497.

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75	208
137	444
75	208
141	394
143	303
143	385
75	208
166	607

CONTRACT.—Sale and Conveyance of Real Estate.—Failure of Consideration.—Rescission.—Specific Performance.—Reconveyance.—Vendor's Lien.
—Complaint.—Pleading.—A complaint in five paragraphs, alleging, in various forms, the sale and conveyance of real estate, to be paid for in notes of good and responsible men, unknown to plaintiff, and living remote from him, but represented by defendant to be ready to pay on demand, and the failure of consideration, in that the notes were worthless, praying a rescission of the contract, or specific performance, or a reconveyance, or a judgment enforcing the vendor's lien, although its language and statements be not very plain or concise, contains the substance of a cause of action, and its paragraphs are sufficient on demurrer.

SAME.—Assessment Lists.—Evidence.—Officer.—Assessment lists, made out and arranged under the direction of a public officer, in pursuance of a duty enjoined by law, are competent evidence as tending to show the amount of property owned by the assessed.

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SAME.—*Certificate of Assessment by Auditor.—Practice.—New Trial.*—On the trial of such action, it was error for the court to admit in evidence certified copies of the tax assessment list of the maker of each of such notes, returned under sections 127, 129 and 130, 1 R. S. 1876, pp. 104, 105, certified by the auditor of the county, merely as “a true copy of the assessment,” etc., of each of the makers of the notes.

EVIDENCE.—*Tax Assessment List.—How Certified.*—To render a copy of a tax assessment list, returned under sections 127, 129 and 130, competent and admissible as legal evidence, under section 283, 2 R. S. 1876, p. 150, it must be certified by the auditor, as keeper of said instrument, to be “a true and complete copy” thereof.

SAME.—*Documentary Evidence.—Authentication.—Requirement of Statute.*—Where a statute prescribes the mode of authentication of records, instruments, etc., no other mode will do.

From the Henry Circuit Court.

J. H. Mellett and E. H. Bundy, for appellant.

BICKNELL, C. C.—This was a suit brought by the appellee against the appellant. The complaint was in five paragraphs.

The first paragraph alleged that the appellee sold the appellant thirty acres of land for fifteen hundred dollars, to be paid in notes of good and responsible men, able and willing to pay such notes promptly; that the appellant offered the appellee the note of Jacob Olinger for \$1,000, and the note of William Stark for \$500, and, to induce the appellee to take said notes in payment for the land, represented to the appellee that Olinger was a good and responsible man, able and ready to pay his note on demand, and that Stark's note was secured by a first mortgage on unincumbered property, and was first-class and sure to be paid; that Olinger and Stark lived in a remote county, and appellant did not know, and had no means of knowing, their circumstances, and believed said representations to be true; that, relying on said representations, the appellee took said notes and conveyed said land to appellant; that all of said representations were false, and were known to be false by appellant; that said land was worth \$1,500, and said notes were worth nothing;

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that appellant, on demand, refused, and still refuses, to pay for the land. Wherefore, etc.

The second paragraph alleges, in substance, the same facts and false and fraudulent representations stated in the first paragraph, and that the appellee, upon discovering the worthlessness of said notes and the bad faith of the appellant, tendered to him said notes, and demanded a rescission of the contract; and that appellee brings said notes into court, and tenders them to appellant, and demands a rescission of the contract.

The third paragraph of the complaint charges that appellant bought the appellee's land for \$1,500, and agreed to pay therefor in two notes, one of \$1,000, and the other of \$500, and further agreed that both of said notes should be the notes of good, solvent, responsible men, able and willing to pay the same, and that said note for \$500 should be secured by a first mortgage on unincumbered real estate of the maker thereof, of the value of \$1,500, and that the appellee, in consideration of said agreements of the appellant, conveyed to him said land by a good and sufficient warranty deed, which the defendant accepted, but has hitherto wholly refused, and still refuses, to deliver to the appellee said notes, or any part thereof.

The fourth paragraph of the complaint states the appellant's proposition to buy said land for \$1,500, and to pay for it by transferring to appellee the note of Jacob Olinger for \$1,000, payable to appellant, and the note of William Stark for \$500, payable to appellant. This paragraph states also the false and fraudulent representations of the appellant as to the solvency and ability of the makers of said notes, and that defendant had no knowledge of the makers of said notes, or their circumstances, and believed and relied upon said representations, and therefore conveyed said land to the appellant, but he, instead of delivering to appellee the said notes payable to appellant, and by him endorsed to ap-

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pelée, refused to do so, and delivered to appellee notes payable to appellee, having procured said Olinger and Stark to substitute these last mentioned notes for the other notes payable to appellant, and which appellant had agreed to transfer to the appellee; and that appellee, as soon as he discovered the worthlessness of said notes and the fraudulent practice of the appellant, tendered said last mentioned notes to him, and "demanded that he receive them and reconvey the land, or that he comply with his contract with appellant, or pay him for his land, all of which he flatly refused, and still refuses, to do."

The fifth paragraph of the complaint alleges that appellant is indebted to appellee in the sum of fifteen hundred dollars, for thirty acres of land, sold to the appellant by the appellee, which the appellant, although often requested, has hitherto wholly refused, and still refuses, to pay.

The complaint ends with a general prayer for "damages, or else that appellant be compelled to specifically perform his contract, or that the contract be rescinded, and appellant ordered to reconvey the land to appellee upon the surrender of said notes, or that the appellee may have judgment for said fifteen hundred dollars, and that the same be declared a vendor's lien upon said land, or such other and further relief as may be right."

To all of these paragraphs, except the fifth, the appellant demurred for want of sufficient facts, etc., and all of the demurrs were overruled by the court.

The appellant answered the complaint by a general denial.

The issues were tried by a jury, who returned the following verdict: "We, the jury, find for the plaintiff, and assess his damages at sixteen hundred and fifty-seven and $\frac{5}{10}$ dollars (\$1,657 $\frac{5}{10}$). T. B. EDWARDS, Foreman."

With their verdict, the jury returned the following interrogatories, propounded to them on behalf of the appellee, and the following answers to said interrogatories:

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"1st. Did not the defendant say to the plaintiff, during the negotiations of the trade, that the notes he was proposing to trade for the land were good notes, and would be promptly paid? Ans. He did. J. B. EDWARDS, Foreman."

"2d. Did not the defendant say, during the negotiation of the trade, that the notes on Olinger and Stark were better than his own notes, and would be paid more promptly than he, the defendant, could pay? Ans. He did.

"J. B. EDWARDS, Foreman."

The appellant moved for a new trial, and filed thirteen reasons therefor.

The appellee thereupon remitted fifty dollars of his verdict, reducing it thereby to \$1,607⁵⁰. The court then overruled the motion for a new trial, and rendered judgment in favor of the appellee for \$1,607⁵⁰ and costs.

From this judgment the appeal was taken. The errors assigned here are as follows:

1st. The court erred in overruling the demurrs to the first, second, third and fourth paragraphs of the complaint.

2d. The court erred in overruling the motion for a new trial.

As to the complaint, the language of the several paragraphs is not very plain or concise; the statements of fact therein are not made with much precision, but they contain the substance hereinbefore stated, and the court committed no error in overruling the demurrs thereto. As to the motion for a new trial, the first, second, fifth and sixth reasons therefor are not mentioned in the brief of the appellants, and are therefore regarded as waived.

The twelfth and thirteenth reasons were fully met and obviated by the remittitur entered by the appellee in the court below. The seventh, eighth, ninth, tenth and eleventh reasons for a new trial present objections to all the instructions given by the court of its own motion, and to the refusal of all the instructions asked for by the appellant, and

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the fourteenth reason objects to the sufficiency of the evidence to sustain the verdict; but the propriety of the instructions given and refused, and the sufficiency of the evidence to sustain the verdict, need not be considered here, because the motion for a new trial must be sustained on account of the improper admission of documentary evidence. The third and fourth reasons for a new trial are as follows:

3d. The court erred in allowing the plaintiff to read in evidence to the jury, over the objections of the defendant, a certified copy of the assessment list of William Stark, for the year 1877, the same being introduced for the purpose of showing the amount of personal property said Stark owned at the time of said trade.

4th. The court erred in allowing the plaintiff to read in evidence a certified copy of the assessment list of Jacob Olinger, for the year 1877, over the objection of the defendant.

It appears by the bill of exceptions that the appellant objected to the introduction of the said documentary evidence, as hearsay evidence, and therefore incompetent, and as inadmissible, because not sufficiently certified. Upon general principles, assessment lists, being public instruments, made out and arranged under the direction of a public officer, in pursuance of a duty enjoined by law, are competent evidence as tending to show the amount of property owned by the assessed. *Ronkendorff v. Taylor's Lessee*, 4 Pet. 349. See also 1 Greenl. Ev., secs. 483, 484, 491 and 493; 2 Phillipps Ev. 291; *Doe v. Seaton*, 2 A. & E. 171, 178; *Rex v. King*, 2 T. R. 234; *Doe v. Cartwright*. 1 C. & P. 218; *Richardson v. Mellish*, 2 Bing. 229.

These lists are required to be returned by the assessor to the county auditor, who is required to preserve the same carefully in his office. 1 R. S. 1876, pp. 104, 105, secs. 127, 129, 130. They are, therefore, "instruments kept in a public office in this State," and under section 283 of the

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practice act, they "shall be proved or admitted as legal evidence in any court or office in this State, by the attestation of the keeper of said * * instruments, * * that the same are true and complete copies of the * * instruments, * * in his custody, and the seal of office of said keeper thereto annexed, if there be a seal," etc.

Where the statute prescribes the mode of authentication, no other mode will do. Thus, in *Allen v. Thaxter*, 1 Blackf. 399, it was held that, where the statute required a seal, an unsealed certificate was inadmissible. So in *Phelps v. Tilton*, 17 Ind. 423, a transcript of a record was held inadmissible because the certificate of the presiding judge to the attestation of the clerk of the court failed to state that the presiding judge was "*of such court*," when the statute, practice act, section 286, required such statement. Again, in *Tull v. David*, 27 Ind. 377, where the statute required the certificate to show "a full, true and complete transcript of the record," this court held a certificate inadmissible, which stated that "the foregoing is a true transcript of the proceedings had in said cause, as appears by the record books." And in *Weston v. Lumley*, 33 Ind. 486, where the statute required the county auditor to certify "a full, true and complete transcript of the record" of the county commissioners, this court held a certificate inadmissible which certified that "the foregoing is truly copied from the records of the board of commissioners." In the case at bar, the auditor was required to certify that the document was "a true and complete copy of the instrument in his custody," but he certified in Olinger's case as follows:

"I certify that the above is a true copy of the assessment of Jacob Olinger, returned by the assessor for the year 1877.

"[L. S.]

W. G. STILL,

"Auditor Wabash County."

In Stark's case he certified as follows:

"I hereby certify that the above is a true copy of the

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assessment list of William Stark for the year 1877. Witness my hand and seal of Board of Comm'rs.

"[L. s.]

W. G. STILL,
"Aud. W. Co."

Under the authority of the cases hereinbefore cited, these certificates do not satisfy the statute ; they do not state that the documents "are true and complete copies of instruments in the custody" of the officer. They ought not to have been admitted in evidence, and the court below erred in overruling the motion for a new trial. The motion ought to have been sustained for the third and fourth reasons alleged therefor. For this error the judgment of the court below ought to be reversed, and a new trial awarded.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded to the court below, with instructions to award a new trial thereof.

No. 8890.

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75	215
127	39
75	215
137	351
75	215
141	134
75	215
147	6
75	215
164	269
75	215
165	184

CRIMINAL LAW.—Murder.—Evidence.—Declarations of Deceased.—Remonstrances with Deceased.—Uncommunicated Threats.—On the trial of an indictment for murder, the court did not err in refusing to admit in evidence statements of the deceased to witnesses, in response to their remonstrances with him for visiting the defendant's wife. Such statements do not fall within the rule making previous threats of the deceased, although uncommunicated, competent evidence for the accused.

SAME.—Wife's Confession of Adultery with Deceased, by his Coercion.—Uncommunicated Reports and Rumors.—On such trial, the court did not err in refusing to permit the accused to prove by his wife that the deceased

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had coerced her into an act of adultery, and that, on the night before the killing of the deceased, she had told her husband that all the reports and rumors he had heard were true, there being no offer to prove what reports or rumors he had heard, or that the act of adultery had ever come to his knowledge.

SAME.—*Argument.—Discretion of Trial Court.—Employment of Counsel by Defendant's Wife.—Witness.*—On such trial, the court did not err in refusing to exercise its discretion and restrain the State's counsel from commenting upon an alleged employment of counsel by the wife—who was a witness—of the accused, the night before the homicide.

SAME.—*Immaterial Statement in Argument.*—On such trial, the statement by an attorney for the State, that “Three or four men have been recently executed at Indianapolis, most of whom set up the plea of insanity,” was not of sufficient materiality to warrant a reversal of the judgment of conviction.

SAME.—*Conduct of Argument.—Abuse of Discretion.*—The conduct of the argument is a matter much within the discretion of the trial court, and it is only where there is an abuse of such discretion that appellate courts will interfere.

PRACTICE.—*Transcript.—Bill of Exceptions.—Date of Filing.—Supreme Court.—Ex Parte Affidavit.*—The date of filing a bill of exceptions, shown by the record below, and correctly copied into the transcript filed in the Supreme Court, can not be contradicted upon appeal by a mere *ex parte* affidavit.

From the Howard Circuit Court.

M. Bell and M. McDowell, for appellant.

D. P. Baldwin, Attorney General, and *J. E. Moore*, Prosecuting Attorney, for the State.

ELLIOTT, J.—Appellant was tried upon an indictment charging him with the crime of murder. The jury found him guilty of manslaughter, and the proper judgment was pronounced upon the verdict.

The only questions discussed are those arising upon the ruling denying appellant's motion for a new trial. The State asks that we disregard the statement of the record, that the bill of exceptions was filed at the date named. This request is based upon the affidavit of the prosecuting attorney contradicting the statement of the record as to the date of the filing of the bill. The date of the filing properly appears

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as a part of the record of the court below, and the entry of filing further appears to be correctly copied into the transcript filed in this court. We know of no rule which permits a statement, which forms part of the record, to be contradicted upon appeal by a mere *ex parte* affidavit. The claim of the State has no support from authority, and is certainly opposed by familiar elementary principles.

Appellant claims that the trial court erred in excluding evidence of declarations made by the deceased. The record shows that the appellant offered to prove, by one Stephenson, the following statements of the deceased, made in response to the witness' remonstrance with the deceased for visiting appellant's wife : "She is a tony little woman, and I propose to go there when I please." By another witness the appellant offered to prove that the deceased, in answer to a remonstrance similar to that of Stephenson, said : "That he would go there as much as he pleased ; that he was not afraid of Combs ; that he was not afraid of his shooting." There was no error in excluding this evidence. It does not fall within either the letter or the spirit of the rule, that previous threats made by the deceased are competent, although not communicated to the accused. Previous threats are competent, because they supply grounds for an inference that the deceased was the assailant, or that he wrongfully brought on the combat. Of declarations such as those sought to be proved in this case, no such thing can be justly said. Especially is this true, where, as in the present instance, such declarations were never communicated to the accused.

The accused offered to prove by his wife, whom he had called as a witness, that the deceased had coerced her into an act of adultery, "and that, on the night before the death of the deceased, the witness had told her husband, the defendant, that all the reports and rumors that he had heard were true." The record recites, that "The court sustained the objection of the prosecution, on the ground that the defend-

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ant would not undertake to show that the facts as detailed were communicated to him." There was no offer to prove what reports or rumors the accused had heard, nor was there any offer to prove that the act of adultery spoken of by the witness ever came to the knowledge of the appellant. We know of no principle or authority which would warrant the introduction of this evidence. A thing utterly unknown to the appellant could not have justified, excused or palliated his taking of Olinger's life. It could not have provoked any sudden transport of passion, nor could it have disproved malice, nor have tended to show that the accused was ever in real or apparent danger. The excluded evidence certainly could not be competent, upon the ground upon which evidence of preceding threats are held admissible, for there had been no combat, not even a quarrel. The appellant crept up to the deceased when he was unarmed and defenceless, while he was engaged in his daily morning work, and deliberately shot him dead. Counsel have neither adduced argument nor cited authority. All they say is: "We submit that this evidence was competent, and should have been admitted." Upon what ground the proposition is based, we are not informed, and we must conclude that counsel could neither invent plausible arguments nor find authority lending their proposition any support.

The appellant's counsel seem to rely most strongly upon the error alleged upon the ruling of the court in permitting one of the attorneys for the prosecution to make certain statements and comments to the jury, in the closing address. One of the statements complained of is thus set forth in the record: "I propose to show that this woman, Mary Combs, went to Richmond the night before the homicide; Judge Bickle lives in Richmond; she went after Bickle, and he was hired by her; Bickle was here early in the term; is here at the trial. We may draw our own inferences from the facts proved." We can not say that the court erred in refusing

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to restrain counsel from commenting upon Judge Bickel's alleged employment by the witness, Mary Combs. It is always proper to show what part a witness has taken in the prosecution or defence of a cause, and, for this purpose, it is proper to ascertain whether he has employed or assisted in employing attorneys. The counsel for the State asked the jury to draw their own inferences from certain facts disclosed by the evidence, and in so doing the counsel may have asked the jury to violate all logical rules, and do violence to all the laws of legitimate inference, but we can not undertake to correct their logic. If there were any facts at all before the jury, the question as to what conclusions should be drawn was one for argument, and it was not for the court to determine whether the inference of counsel was a correct or an erroneous one. Another consideration requiring us to rule against the appellant upon this point, is that the record does not show what statements or admissions were made by Judge Bickle or his associate counsel to the jury, in the addresses made in appellant's behalf ; for aught that appears the employment of Judge Bickle by Mary Combs, appellant's wife as well as witness, might have been freely admitted. There certainly would have been no impropriety in the wife's having employed counsel for her husband, and none, surely, in counsel's having accepted employment from her. The circumstances of such employment might, nevertheless, have been fair matter for comment in the presentation of the case to the jury, for there are in the evidence some singular circumstances connected with the behavior of the witness, Mary Combs.

One of the attorneys for the prosecution, in addressing the jury, said : "Three or four men have been recently executed at Indianapolis, most of whom set up the plea of insanity," and of this statement appellant earnestly and bitterly complains. We do not regard such a statement as of sufficient materiality to warrant a reversal. Courts ought not to reverse causes because counsel, in the heat of argu-

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ment, sometimes make extravagant statements, or wander a little way outside of the record. If a matter of great materiality is brought into the record as a matter of extended comment, then there would be reason for setting aside the verdict. If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel, during the argument, may have made some general statements not supported by evidence. Of course, there may be cases where the matters stated are so weighty and important as to do the accused injury, and, whenever this is so, the appellate court should not hesitate to adjudge a reversal. The matters introduced into the argument of counsel in *Ferguson v. The State*, 49 Ind. 33, were of a character very likely to work the accused serious harm, and the judgment was rightly reversed. The conduct of the argument is a matter much within the discretion of the trial court, and it is only where there is an abuse of discretion that appellate courts will interfere. This is the doctrine of *Ferguson v. The State*, and is sustained by authority. *Hatcher v. State*, 18 Ga. 460; *State v. Hamilton* 55 Mo. 520; *Larkins v. Tarter*, 3 Sneed, 681; *McNabb v. Lockhart*, 18 Ga. 495; *Thompson v. Barkley*, 27 Pa. St. 263; *Read v. The State*, 2 Ind. 438; Hilliard New Tr. 225.

It is the duty of the judge who presides at the trial to restrict the argument upon the facts to such as are established by, or inferable from, the evidence; but, in doing this, it is not his duty to abridge the freedom of debate, by preventing counsel from enforcing this argument by illustration or example. It is not always easy to correctly draw the line between what is proper and what is improper. Matters of common, general public information may sometimes

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be properly referred to, and matters of known and settled history may often be commented upon with entire propriety, but matters of a local nature, or matters not of common and public notoriety, are not properly the subject of comment. To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and the appellate courts, and it is far better to commit something to the discretion of the trial court than to attempt to lay down or enforce a general rule defining the precise limits of the argument. If counsel make material statements outside of the evidence which are likely to do the accused injury, it should be deemed an abuse of discretion, and a cause for reversal ; but where the statement is a general one, and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the court to check counsel should not be deemed such an abuse of discretion as to require a reversal.

We are asked to reverse upon the evidence, and it is insisted, with ability and earnestness, that the testimony of the medical experts clearly shows that the appellant was insane at the time the homicide was committed. We have carefully examined the evidence, and are satisfied that the verdict is well supported. There is, indeed, much expert testimony given upon hypothetical cases, which is favorable to the appellant, but this is far outweighed by evidence of real, substantial facts, which furnish the verdict of the jury a solid foundation. Part of the testimony given by the medical witnesses is of a mere speculative character, and of no great importance ; other parts, to say the least, are of such a character as to do no great credit to either the witness or the profession.

Judgment affirmed.

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No. 8095.

CAMPBELL ET AL., EXECUTORS, *v.* O'BRIEN.

TRESPASS.—*Highway.*—*Locus in Quo.*—*Dedication to Public Uses.*—*Railroad Company.*—*Assent of Owner.*—*Street of City.*—*Grade of Railroad.*—*Erection of Bridge.*—*Evidence.*—In an action against a township trustee for trespass, in entering plaintiff's close and cutting down fence-posts thereon, a dedication of the *locus in quo* to public uses was proved by evidence showing that a railroad company, to secure a lower grade for its road across a street forming the north boundary of a city, was to furnish a strip of plaintiff's ground for a street-crossing further north, at surface grade, and entered into negotiations with plaintiff, and agreed, not in writing, upon a price; that the company took possession of the old street-crossing, and its engineer, assisted by plaintiff, surveyed the line of the new road; that a new bridge was necessitated by the change of highway, and was constructed; and that plaintiff resided in immediate proximity to the premises occupied, and had knowledge of the use of his land for the highway as changed from the time it commenced, although plaintiff never received payment for his land from the company or the county. WOODS, J., dissents.

HIGHWAY.—*Dedication.*—*Right of Public.*—*Assent of Owner to Use of Land.*—*Public Accommodation and Private Rights.*—The right of the public to a highway does not rest upon a grant by deed, nor upon a twenty years' possession, but upon the use of the land, with the assent of the owner, for such length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment.

SAME.—*Estoppel.*—*Vendor's Claim Against Public.*—After public rights have intervened, the owner of land used as a highway with his assent is estopped thereby, and can not enforce a vendor's claim against the public.

From the Porter Circuit Court.

T. J. Merrifield, for appellants.

A. L. Jones, for appellee.

NEWCOMB, C.—This action was brought by Thomas E. A. Campbell, to recover damages for entering his close and cutting down certain fence-posts thereon. The cause was submitted to the court, and the evidence heard at the December term, 1877, and was taken under advisement. Before judgment the plaintiff died, and the appellants, his executors, appeared and were substituted as plaintiffs. The parties then agreed that the cause should be decided by the court

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on the evidence submitted at the former term. A finding was then entered for the defendant, and judgment was rendered accordingly, over a motion of the appellants for a new trial. The only error assigned is the overruling of that motion.

The facts, as shown by the record, are substantially as follows: In the autumn of 1873 the Peninsular Railroad Company, the name of which corporation appears to have been afterward changed to that of the Chicago and Lake Huron Railroad Company, was engaged in grading its road through the city of Valparaiso, and sought permission to cross Third street, the northern boundary of the city, at a level five feet below the then grade of said street. Conferences were held between the officers of the railroad company, the mayor and a committee of the common council of the city, the county commissioners and the township trustee, which resulted in an agreement that the railroad company should be permitted to so sink the grade at Third street, provided they furnished the ground for a change of the street to a point slightly further north, where it could cross the railroad at the surface grade. The land necessary to be occupied by the proposed change of route belonged to the plaintiff. The railroad company, by its agents, McClelland and Starr, entered into negotiations with the plaintiff for the purchase of the necessary strip of ground to make the change. A price was agreed upon, and, soon after, the railroad company removed the plaintiff's fence, obstructed the travel at the Third street crossing, and turned it over the plaintiff's land so agreed to be purchased. The line of the new road was surveyed by the engineer of the railroad company, the plaintiff being present and assisting in the survey. The change in the course of the highway necessitated the construction of a new bridge, to conform to it, over the Pittsburgh, Fort Wayne and Chicago Railroad, which, at that point, ran in close proximity to the Chicago and Lake

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Huron Railroad. The plaintiff never received payment for his land, but it does not appear that the public authorities, interested in the change of the highway, had any notice of that fact until several months after the road was so changed, and the new bridge was erected, and the old highway so destroyed by the railroad as to render it impracticable to resume its use as a highway.

The plaintiff resided in immediate proximity to the premises so occupied, and had knowledge of the use of his land for the highway as changed, from the time its use as such by the public commenced. There was no written contract executed by the plaintiff for the sale of this land, but at the May term, 1874, of the Porter Circuit Court, he sued McClelland and Starr for its price, after having tendered them a deed to the railroad company. On the trial of that action the plaintiff suffered a nonsuit, and afterward petitioned the board of county commissioners to make him compensation for the land so taken. This petition was, however, abandoned, and, as the next means of procuring payment, the plaintiff and divers other parties presented a petition for a change in the highway, so as to locate it, by an order of the board of commissioners, on the line which had been previously occupied as above stated, over plaintiff's land. Viewers were appointed, who reported that on examination they found a good and sufficient travelled road already in existence on the route proposed in the petition, and recommended that the prayer of the petition be not granted. This appears to have ended that proceeding. Afterward, on December 10th, 1875, the plaintiff notified the township trustee, in writing, to remove the obstructions in the former road, as he would enclose his land over which the public passed, on the 13th day of that month. He so far proceeded to so enclose his premises as to plant fence-posts across the road as used. These were removed by the defendant, who was the township trustee, which was the trespass complained of.

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When the plaintiff agreed to sell the strip of ground in controversy to the railroad company, he knew that the purpose and object of the purchase was to appropriate it as a highway, and knew of the immediate obstruction of the old road, the change of the course of travel occasioned thereby, and of the subsequent erection of the new bridge, as a consequence of such change. The only question in the case is, did the acts and acquiescence of the plaintiff amount to a dedication of the *locus in quo* to the public, for use as a highway? That there was such dedication we entertain no doubt. True, the owner did not directly dedicate, but he stood by and permitted the railroad company to do so, and this was equivalent to a dedication by himself. He expected to be paid by the railroad company for the land, but the failure of the latter to compensate him could not change the rights of the public, which had been previously granted with his knowledge and consent, and which could not be resumed by him without serious public inconvenience and loss. In 2 Greenleaf Evidence, sec. 662, it is said of a dedication of land for a highway: "The right of the public does not rest upon a grant by deed, nor under a twenty years' possession; but upon the use of the land, with the assent of the owner, for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." This doctrine was expressly approved by this court in *The State v. Hill*, 10 Ind. 219, and *Hays v. The State*, 8 Ind. 425. See, also, *The City of Columbus v. Dahn*, 36 Ind. 330.

It is urged by appellants that the public had no right to assume a dedication by Campbell of the premises in controversy, because it was known to the proper public officers that he did not intend to make a dedication, but that he agreed to sell to the railroad company, and that, as a vendor, he had a right to resume possession in case the purchase-money was not paid.

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While it is true that Campbell contemplated a sale, so far as he was concerned, he knew that the railroad company intended to dedicate the land to public use as a highway, and this he permitted the corporation to do without objection, and without notice of the non-payment of the purchase-money, until after the consideration for the change of route had been received by the railroad company, the old route essentially destroyed, and the new road and the new bridge had, for a considerable period, been used by the public.

He assented to the dedication of the land in controversy to the public by the railroad company, the latter assuming to hold by purchase from him, and he was estopped by such assent, after public rights had intervened. 2 Greenleaf Evidence, sec. 663. Under these circumstances, he could not enforce a vendor's claim against the public.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of appellants.

Woods, J., dissents, and files opinion.

DISSENTING OPINION.

Woods, J.—It is clear on the facts stated in the principal opinion, that the testator, Campbell, had not himself intended to dedicate the *locus in quo* to public use, and that he did not authorize the railroad company, as his agent and for him, to make the dedication. He simply made an oral bargain to sell the land to the railroad company, and, in the expectation that the bargain would be consummated, made no objection to the removing of his fences and to the use of the ground for the purposes of public passage and travel. But the bargain was not consummated, nor put into such shape as to be binding on him or on the railroad company. It was not put in writing, nor so far executed as to take it out of the statute of frauds. It is claimed that the railroad

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company, with Campbell's consent, made the dedication ; but the railroad company had not acquired the power, of its own will and in its own right, to make a dedication, and of this the world was bound to take notice, so long as the title remained in the testator. The railroad company did not profess to act upon Campbell's authority, but in its own right, which, as was well understood, depended on the completion of the contract of purchase. It was a part of the negotiation between the company and the public officials, that the company should procure the right to turn the street upon the testator's land, and it may be said that the company acted as the agent of the officials, with as much propriety as that it acted for deceased. The deceased was not estopped to deny the right of the company to make the dedication. The public made no expenditure upon the disputed land, in opening the new passage way. It did not vacate the street as it had been, and if it permitted the railroad to obstruct the street, and build a bridge on the proposed new way, but not on the testator's land, it is no ground for an estoppel, though it appear that he stood by and saw these things done without objecting. He had no right to object ; and if the public saw fit to make expenditures, and to permit the street to be occupied, on the faith of the alleged dedication, made, as it was, by the company before it obtained either a legal or equitable title, the testator could not be estopped to dispute the validity of the dedication because he did not object to the temporary public use of his land, he having done this in the expectation that the company would complete its purchase, and pay the price, and not through an intention to dedicate, which means to give. The intent to dedicate is an essential element of the transaction.

Campbell and the public both acted on the faith they had in the conduct of the railroad company. The railroad company did not keep faith with either ; but does it follow that Campbell alone should suffer ? On the contrary, having re-

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tained his title, he was in the stronger position, and his right should prevail. It is true that a deed is not necessary to the making of a dedication, but it was necessary to the railroad company's right to make it in this case, and of this, under the circumstances, the public was bound to take notice, if it did not have actual notice, as it probably had. The burden of proving an estoppel was on the appellee, and this includes the proof of the want of notice. It is not pretended that Campbell's various efforts to get pay for his land materially affected the question. They tend to show that he never intended a dedication.

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No. 7821.

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PRACTICE.—Pleading not Subscribed.—Demurrer.—Form.—Substance.—Motion to Reject or Strike Out.—Every pleading, in a court of record, must be subscribed by the party or his attorney; but an objection to a pleading, that it is not thus subscribed, can not be reached by a demurrer for the want of sufficient facts. Such an objection goes to the form, and not the substance, and can be reached only by a motion to reject or strike out the pleading.

SAME.—Blanks in Pleading.—Motion to Make More Certain and Specific.—An objection to a pleading, on account of blanks, can not be reached by demurrer, but by a motion for an order requiring the party to make his pleading more certain and specific.

SAME.—Written Instrument Part of Pleading.—The statement in a pleading founded upon a written instrument, "a copy of which is filed herewith," is sufficient to make the copy following the pleading a part thereof.

SAME.—Variance.—Copy Controls.—In such a case, if there is a variance between the description of the instrument and the copy therewith filed, the copy controls, and will be presumed to be right until the contrary appears.

SAME.—Deed.—Bond.—Dates of Two Instruments.—When Execution Presumed.—Date of Acknowledgment.—Where a deed was dated July

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20th, 1861, and a bond for reconveyance was dated July 30th, 1861, and both were acknowledged July 31st, 1861, it may fairly be assumed that the final execution of the two instruments by delivery were concurrent acts, and both consummated on the day of the date of the acknowledgments thereof.

SAME.—*Venire de Novo.*—*Verdict.*—*Plaintiffs or Defendants.*—*Cross Complaint.*—*Original Complaint.*—A party plaintiff is not entitled to a *venire de novo* because the general verdict is: “We, the jury, find for the defendants on the plaintiff’s complaint, and for the defendants on the cross complaint.” Technically, defendants filing a cross complaint, are plaintiffs therein; but there is no impropriety in designating them as defendants, to distinguish them from the plaintiffs in the original complaint.

SAME.—*Evidence.*—*Title Bond Acknowledged and Recorded.*—A title bond duly acknowledged before the recorder, and recorded, was properly admitted to record, and the record of the bond was competent evidence to prove its contents.

MORTGAGE.—*Deed and Title Bond.*—A deed and a title bond for reconveyance may constitute, in legal effect, a mortgage.

SAME.—*Payment.*—*Weight of Evidence.*—*Supreme Court.*—A verdict, finding that a deed was in legal effect a mortgage, and that the mortgage debt has been fully paid, will not be disturbed by the Supreme Court on the mere weight of evidence not entirely clear and satisfactory.

From the Monroe Circuit Court.

J. F. Pittman, J. H. Louden and R. W. Miers, for appellant.

P. C. Dunning, J. W. Buskirk and H. C. Duncan, for appellees.

Howk, C. J.—This action was commenced by the appellant against the appellees, as the widow and heirs at law of John Martin, deceased, on the 3d day of August, 1878. The object of the action was to quiet the appellant’s title to certain real estate, particularly described, in Monroe county, which he claimed to be owner of, under a deed executed to him by the said John Martin and the appellee Margaret Martin, the wife of said John, in his lifetime, and to enjoin the appellees from cutting or removing any timber from said real estate. To the appellant’s complaint the appellees an-

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swnered in two paragraphs, and also filed a cross complaint or counter-claim. The appellant's demurrers, for the want of facts, to the second paragraph of appellees' answer and his cross complaint, were severally overruled by the court, and his exceptions saved to these rulings. The cause, having been put at issue, was tried by a jury, and a general verdict was returned for the appellees, both as to the complaint and cross complaint; and the appellant's motions for a *venire de novo* and for a new trial, having each been overruled, and his exceptions saved to each of these decisions, the court rendered judgment in accordance with the verdict.

In this court, the appellant has assigned as errors the following decisions of the circuit court:

1. In overruling his demurrer to the second paragraph of answer;
2. In overruling his demurrer to the cross complaint;
3. In overruling his motion for a *venire de novo*; and,
4. In overruling his motion for a new trial.

We will consider and decide the several questions arising under these alleged errors, in the same order in which the appellant's counsel have presented and discussed them, in their well considered brief of this cause:

1. In the second paragraph of their answer, the appellees admitted the execution of the deed set out and described in the appellant's complaint, by the said John Martin, in his lifetime, and the appellee Margaret Martin, his wife; but they averred, that the said deed was intended to be and was a mortgage to secure the sum of \$——, theretofore loaned by the appellant to said John Martin; that at the time of the execution of said deed, and as a part of the transaction and agreement of the parties, the appellant executed to said John and Margaret Martin a bond, reciting the making of said deed and obligating the appellant to reconvey the said real estate to said John and Margaret on the repayment to him of said sum.

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The appellant's counsel first object to the sufficiency of this paragraph of answer, upon the ground that it was not signed by the appellees, or by their attorneys. Section 78 of the code of 1852, and section 109 of the civil code of 1881, alike require that "Every pleading in a court of record must be subscribed by the party, or his attorney." But, if it were true that the second paragraph of answer was not subscribed by the appellees or their attorneys, this objection thereto could not have been reached by the appellant's demurrer for the want of sufficient facts. The objection goes to the form and not the substance of the paragraph, and it could have been reached only by a motion to reject or strike out the pleading. *Fankboner v. Fankboner*, 20 Ind. 62; *Lowry v. Dutton*, 28 Ind. 473; and *Hewell v. Jenkins*, 60 Ind. 110.

Appellant's counsel also object to the sufficiency of the second paragraph of answer, on account of the blank therein as to the amount of the alleged mortgage debt. This objection, also, like the one just considered, could not be and was not reached by the appellant's demurrer to the paragraph for the want of sufficient facts. If the appellant wished to have the blanks filled in the paragraph, he should have moved the court for an order requiring the appellees to make the pleading more certain and specific, in regard to such blanks therein.

Counsel further claim that the paragraph was bad, on the demurrer thereto, because a copy of the bond mentioned therein was not made a part of the paragraph, in the mode prescribed by law. This point is not well taken. It was stated in the paragraph of such bond, that "a copy of which is filed herewith;" and in the record before us the paragraph is followed by a copy of such a bond as was described therein. This was sufficient, under the code. *Reed v. Broadbelt*, 68 Ind. 91; *Carper v. Kitt*, 71 Ind. 24. In such a case, if there is a variance between the description of the

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bond in the paragraph, and the copy of the bond therewith filed, the rule is that the copy controls and will be presumed to be right, until the contrary appears. *Crandall v. The First National Bank, etc.*, 61 Ind. 349; *The Liberty, etc., Association v. Watkins*, 72 Ind. 459.

The deed mentioned in the appellant's complaint was dated on the 20th day of July, 1861, and the bond described in the second paragraph of answer was dated on the 31st day of July, 1861. On account of this discrepancy in the dates of the two instruments, it is claimed by the appellant's counsel, as we understand them, that the deed and bond were not executed concurrently and as parts of one and the same transaction, and that, for this reason, the demurrer to the second paragraph of answer ought to have been sustained. The deed and the bond appear, however, to have been both acknowledged on the same 31st day of July, 1861, before the recorder of Monroe county; and therefore it may be fairly assumed, we think, that the final execution of the two instruments, by the delivery thereof, were concurrent acts and both consummated on the day of the date of the acknowledgments thereof.

No error was committed by the circuit court, we think, in overruling the appellant's demurrer to the second paragraph of answer.

2. In their cross complaint, the appellees alleged, in substance, that on the —— day of ——, 18—, John Martin, being the owner in fee simple of the real estate described in the complaint, and his wife, the said Margaret Martin, conveyed the said land by a deed absolute on its face, to the appellant; that the said deed was intended to be and was only a mortgage to secure to the appellant the repayment of the sum of \$——, theretofore loaned by him to the said John Martin; that on the same day, and as a part of the transaction and agreement of the parties, the appellant executed to the said John and Margaret Martin a bond in the

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penalty of \$3,000.00, and conditioned that he would, upon the repayment to him of said sum of \$—, reconvey said land to said John and Margaret Martin; copies of which bond and deed were filed with said cross complaint. And the appellees further said, that the said sum had been fully paid to the appellant; and that the said John Martin, on the — day of —, 18—, died intestate, leaving the said Margaret Martin, his widow, and the other appellees, his children and heirs at law, surviving him, who were then the owners of said real estate in fee simple. Wherefore the appellees prayed that the said deed might be declared to be a mortgage, and, as such, to be fully paid and satisfied, and for other proper relief.

The first point made by the appellant's counsel, in discussing the sufficiency of this cross complaint, has reference to the blanks appearing therein, both as to dates and amounts. Doubtless, these blanks are a just subject of criticism, and were in direct violation of the rules of good pleading; but, while this is so, we are of the opinion that the objection to the cross complaint, on account of the blanks appearing therein, was one which could not be reached by the demurrer thereto for the want of facts, but only by a motion to make the pleading more certain and specific as to dates and amounts.

The appellant's counsel again refer, in argument, to the apparent discrepancy between the dates of the deed and of the title bond, as indicating beyond a peradventure that the deed and the bond were not concurrent acts and parts of one and the same transaction; and, therefore, they claim that the deed in question can not be regarded as a mortgage, and the demurrer to the cross complaint ought to have been sustained. In our view of this question, as already stated, the deed and the bond, although bearing different dates, were concurrently executed as parts of one and the same transaction, as was shown by the acknowledgment of the two instruments on one and the same date. It was alleged in

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the cross complaint, that the deed and bond were executed on the same day, as parts of one and the same transaction and agreement ; and this allegation was admitted to be true by the appellant's demurrer. It is clear, therefore, that the appellant's objection to the sufficiency of the cross complaint, upon the ground of the difference in the dates of the deed and bond, is not presented by his demurrer, for the want of facts, to the pleading in question, and is not well founded. Our conclusion is, that the court did not err, in overruling the appellant's demurrer to appellees' cross complaint.

3. The next supposed error, of which appellant's counsel complain, is the decision of the trial court in overruling the motion for a *venire de novo*. The general verdict of the jury was, in substance, as follows : "We, the jury, find for the defendants on the plaintiff's complaint, and for the defendants on the cross complaint." Of this verdict, the appellant's counsel say, in argument : "We think it should read, 'We find for the defendants on plaintiff's complaint, and for the plaintiffs on the cross complaint.' " In other words, it is claimed that the defendants in the complaint were plaintiffs in their cross complaint and ought to have been so designated in the verdict on their cross complaint. Technically, no doubt, the defendants, who file a cross complaint, are plaintiffs therein ; but even then there is no impropriety in designating them as defendants, in order to distinguish them from the plaintiff in the original complaint. It is as defendants they file their cross complaint, and, if they were not defendants, they could not file any such pleading. The appellant's objection to the general verdict did not, we think, entitle him to a *venire de novo*.

4. Under the alleged error of the circuit court, in overruling the motion for a new trial, it is earnestly insisted by the appellant's counsel, that the general verdict of the jury was not sustained by sufficient evidence and was contrary to law. The evidence showed very clearly, as it seems to

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us, that the deed and the bond were parts of one and the same contract, and together constituted a mortgage, in legal effect, to secure the payment to the appellant by John Martin of the sum of \$265.70, "on the 25th day of December, 1862, or any reasonable time thereafter." On the question of the payment of this mortgage debt, as alleged in the cross complaint, the evidence was not so clear and satisfactory, as perhaps, it would have been if the suit had been tried in the lifetime of both the parties to the contract. But we can not, under the well established practice of this court, disturb the verdict of the jury on the weight of the evidence, for, as we read the record, the evidence adduced upon the trial tended fairly to sustain the verdict on every material point. The verdict was not contrary to law.

Appellant's counsel claim that the court erred on the trial in admitting in evidence the record of the title bond, made part of appellees' answer and cross complaint, as the same had been recorded in the recorder's office of Monroe county. The bond had been duly acknowledged by the appellant before the recorder, and was properly admitted to record. 1 R. S. 1876, p. 759, sec. 2. The record of the bond was competent evidence. The motion for a new trial was correctly overruled.

The judgment is affirmed, at the appellant's costs.

No. 7501.

STONE, ADM'R, ET AL. v. THE STATE, EX REL. BURDSALL.

PRACTICE.—Complaint.—Several Demurrer.—Approved Form.—A demurrer, "The defendants herein demur to each of the paragraphs of the complaint, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action," accords substantially with the form approved for a several demurrer, and is sufficient.

75	235
134	71
75	235
152	42

75	235
160	228
75	235

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SAME.—*Construction of Code.*—The code of practice requires a liberal construction, with a view to substantial justice.

REPLEVIN BAIL.—*Attestation.*—*Entry of Contract not Invalid.*—*Justice of the Peace.*—An entry of a contract of replevin bail is not invalid, by reason of the failure of the justice to note the required attestation.

SUPREME COURT.—*Practice.*—*Judgment on one Paragraph of Complaint.*—*Other Paragraphs not Considered.*—Where it is manifest that a judgment rests upon the only paragraph of a complaint containing the cause of action, it will be considered by the Supreme Court, and objections to the other paragraphs presenting no important question passed by.

From the Monroe Circuit Court.

E. K. Miller, J. H. Louden and R. W. Miers, for appellants.

J. W. Buskirk and H. C. Duncan, for appellee.

Woods, J.—Action upon the official bond of a justice of the peace; complaint in three paragraphs; error assigned upon the overruling of the demurrer to the complaint and of the motion for a new trial.

Counsel for the appellee contend that the demurrer is joint, and not separate to each paragraph of the complaint, and that, if any of the paragraphs is good, the exception is not available. They cite *Stanford v. Davis*, 54 Ind. 45; *Silvers v. The Junction R. R. Co.*, 43 Ind. 435; Buskirk's Practice, 193-5.

The language of the demurrer in this case is as follows: “The defendants herein demur to each of the paragraphs of the complaint, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action.”

This accords, substantially, with the form for a several demurrer suggested in *Silvers v. The Junction R. R. Co.*, *supra*, and is sufficient. It is addressed to each paragraph, and the addition of the words “separately and severally” would be a meaningless tautology. The statement of the cause of demurrer, “that neither of said paragraphs states facts sufficient,” etc., is doubtless subject to the criticism of counsel, that it alleges the insufficiency of each paragraph

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as a ground of objection to any one, while it ought to be so stated as to charge the insufficiency of the particular paragraph under consideration. The same criticism may be made upon the form suggested in the case referred to, but we are not inclined to hold that papers must be drawn with absolute nicety and accuracy of expression. It is enough if the meaning is reasonably clear. The code requires a liberal construction, with a view to substantial justice between the parties. Section 90.

The first paragraph of the complaint, for breach of the bond, charges the acceptance by the justice of irresponsible replevin bail. The second paragraph alleges the failure and refusal of the justice to issue execution upon a judgment taken before him by confession in favor of the plaintiff. The third paragraph avers the negligent failure of the justice to attest the contract of replevin bail which he accepted and entered upon his docket, for want of which attestation, it is alleged, the contract was invalid. It is further averred that the justice neglected to issue execution until after the expiration of the time of stay allowed by law in such a case, upon a proper entry of replevin bail, and that thereby the plaintiff lost his judgment. The answers to special interrogatories returned by the jury demonstrate that the verdict and judgment rest upon the third paragraph, and that there existed no cause of action except upon that paragraph ; and, as the objections made to the first and second paragraphs present no important question, we pass them by.

The demurrer to the third paragraph should have been sustained. The entry of the contract of replevin bail was not invalid by reason of the failure of the justice to note the required attestation ; though it is fair to the circuit court, and to the counsel engaged in the case, to say that, at the time the trial was had, the ruling of this court had been that such attestation was necessary. *Houglan v. The State*, 43 Ind. 537 ; *Fentress v. The State*, 44 Ind. 271. These cases,

The State *v.* Hamilton.

in this respect, have been overruled. *Miller v. McAllister*, 59 Ind. 491; *The Vincennes National Bank v. Cockrum*, 64 Ind. 229; *Hawes v. Pritchard*, 71 Ind. 166; *Eltzroth v. Voris*, 74 Ind. 459; *Ensley v. McCorkle*, 74 Ind. 240.

The questions presented on the motion for a new trial need not be considered. The judgment is reversed, with costs and with instructions to sustain the demurrer to the third paragraph of the complaint.

• • •

No. 8716.

THE STATE *v.* HAMILTON.

LIQUOR LAW.—Sale to Minor.—License.—Under the provisions of the act of March 17th, 1875, 1 R. S. 1876, p. 871, the sale of intoxicating liquor to a minor is one of the prohibited sales which a license does not authorize a vendor by retail to make; and hence, in a prosecution for such a sale, it is immaterial whether the defendant has or has not a license to sell to another and a different class of persons.

From the Wabash Circuit Court.

D. P. Baldwin, Attorney General, *M. Good*, Prosecuting Attorney, and *O. H. Bogue*, for the State.

NIBLACK, J.—This was a criminal prosecution, commenced before a justice of the peace. The affidavit was as follows:

“George King, being duly sworn according to law, upon his oath says that, on the 26th day of December, 1879, at the county of Wabash, in the State of Indiana, one Schuyler Hamilton did then and there unlawfully sell one gill of intoxicating liquor, to wit, gin, for the sum of ten cents in money, the same being less than a quart, to one Orlando C. King, who was then and there under twenty-one years of age, contrary to the form of the statute in such cases made

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and provided, and against the peace and dignity of the State of Indiana."

The defendant was convicted of the offence charged against him, before the justice. Upon an appeal to the circuit court, the affidavit was quashed, and the defendant discharged. The State has appealed, and assigned error upon the decision of the court quashing the affidavit.

We have no brief from the appellee, and consequently no argument against the sufficiency of the affidavit; but counsel for the State inform us that the affidavit was quashed because it did not allege that the appellee had no license authorizing him to sell intoxicating liquors in a less quantity than a quart at a time. The sale of intoxicating liquor to a minor is one of the prohibited sales which a license does not authorize a vendor by retail to make, and hence it is wholly immaterial whether a person selling intoxicating drink to a minor has or has not a license to sell to another and a different class of persons. 1 R. S. 1876, p. 871, secs. 9 to 15. *Meyer v. The State*, 50 Ind. 18.

The affidavit was not, therefore, bad for the reason suggested, nor are we able to see any substantial objection to the affidavit in any other respect. In our estimation the court erred in quashing the affidavit.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 7033.

CLAY v. VANWINKLE.

PARTNERSHIP.—Husband and Wife.—Replevin.—Evidence.—In an action by a wife against a constable to replevy goods levied upon as the property of the husband, on a judgment against him, the evidence showed that the husband had entered into a partnership business upon money furnished him by his wife, and that the debt for which the levy was made was created during the partnership; that the wife furnished no

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money during the partnership; but, a short time before the levying of the execution, she had purchased the partner's interest, and that she had since purchased the goods levied on, with her own funds; that the husband had the entire control and management of the business after his wife's purchase of the partner's interest, and had an equal interest with his wife in the business.

Held. that the wife could not recover the goods as her individual property.

From the Lake Circuit Court.

M. Wood and T. J. Wood, for appellant.

J. W. Youche and A. L. Jones, for appellee.

FRANKLIN, C.—Appellant brought a suit in replevin for personal goods that had been levied upon by appellee, as constable, as the property of John H. Clay, her husband, upon an execution issued upon a judgment rendered against the husband and others. Trial by jury, verdict for defendant, motion for a new trial overruled, and judgment for defendant.

The only error assigned is the overruling of the motion for a new trial, and that was based upon the reason that the verdict was not supported by sufficient evidence.

The evidence shows that a short time before the judgment was rendered upon which said execution was issued, appellant's husband and one Eli Wanders formed a partnership in the grocery store business; that she had given to her husband, to do business on, about \$975; that this debt of \$100, for which the levy was made, was created during said partnership; that she let her husband have no money during the partnership; that she, a short time before the levying of the execution, had bought Wanders out, and that she had since purchased the goods levied upon, with her own funds. The testimony showed that her husband had the entire control and management of the business after the close of the partnership with Wanders, and had an equal interest therein with his wife.

We think the appellant had no right to replevy the goods as her individual property, and that the evidence in the case supported the verdict of the jury.

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PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at appellant's costs.

No. 8713.

WEIS v. THE CITY OF MADISON.

CITIES AND TOWNS.—Grading Public Street.—Consequential Damages.—

Appropriation.—Constitutional Law.—Consequential damages, resulting from the grading of a public street, do not constitute a taking or appropriation of property, within the meaning of the constitution.

SAME.—Authorized Improvement.—Reasonable Care.—Injury to Property of Adjacent Proprietors.—Where an improvement of a street in a city is one which the city has authority to make, and reasonable care is used in doing the work, no liability attaches, although injury may be done to the property of adjacent proprietors.

PLEADING.—Actionable Negligence.—Negligence or no negligence must be determined from the facts pleaded, not from the presence or absence of general epithets.

SURFACE-WATER.—Municipal Corporations.—A municipal corporation has no right to collect surface-water in an artificial channel, and pour it in a body upon the adjacent land of another.

SAME.—Cities and Towns.—Public Highways.—Embankments and Outlets.—A city may divert surface-water from the public highways, and, to do so, may build embankments or enlarge outlets.

SAME.—Dominion Over Highways.—A municipal corporation is entitled to exercise dominion over the public highways, and is not liable for so exercising this right as to change or divert the flow of surface-water.

SAME.—Watercourse.—A natural watercourse is a stream of water flowing in a certain direction, through a defined channel, with bed and banks. The channel may sometimes be dry, but there must be substantial indications of the existence of a stream, ordinarily a moving body of water.

SAME.—Ravines.—Ravines, through which surface-water runs in times when there are heavy rainfalls, are not natural watercourses.

SAME.—Obstruction of Natural Watercourse.—Liability.—If a natural watercourse is wrongfully obstructed, there is a plain liability.

SAME.—Flow Upon Lots Below Adjacent Streets.—City.—Damages.—If surface-water flow upon a lot because of its being below the level of adjacent streets or lots, the owner can not recover damages from the city.

75	241
124	316
126	86
75	241
132	482
75	241
134	272
75	241
138	616
75	241
142	609
143	409
75	241
149	672
152	125
152	610
75	241
153	343
153	518
75	241
158	241
75	241
164	444
75	241
165	42
75	241
166	21
168	211

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SAME.—*Municipal Corporations.—Legislative Power.—Ministerial Acts.—Negligent Performance.*—A municipal corporation is not liable for the exercise of a legislative power, but is liable for the negligent performance of ministerial acts.

SAME.—*Collecting and Flowing of Surface-Water.*—Collecting surface-water into one channel, and causing it to flow upon another's land, is an actionable injury, being a ministerial and not a legislative or judicial act.

SAME.—*Defect of Plan.*—For a defect in the mere plan or system of removing surface-water from a street, there is no liability so long as the ministerial work of carrying into effect the plan is not undertaken.

SAME.—*Pleading.—Action Against City for Damages.—Complaint.*—A paragraph of complaint against a city, which alleges with reasonable certainty, that the municipal authorities did, by the improvement of a street, collect in one channel the surface-water falling upon divers streets, and flow it against an insufficient culvert, and thus unlawfully cast the water in a body upon the private property of the plaintiff, contains facts sufficient to constitute a cause of action.

SAME.—*Insufficient Evidence.*—On trial of such an action, the court did right in directing a verdict for the defendant, where the evidence showed that plaintiff had suffered no material damage from overflow before the city enlarged the culverts and drains complained of; that, before such action of the city, the natural tendency of the surface-water was to flow by without damage; and that his property is at the foot of "high hills," where in times of rain the water comes down the ravine in "immense quantities."

PRACTICE.—Verdict.—Court May Direct.—There are cases where the court may rightfully direct a verdict.

SAME.—Verdict Against Law and Evidence.—A judge is not bound to submit a question to a jury, where their verdict, if contrary to his views of the evidence and its legal effect, would be certainly set aside as clearly against the law and the evidence.

SAME.—Courts interfere only in cases where it is manifest that there is no evidence upon which a verdict could legally rest.

SAME.—Exception.—Leave to State in Writing.—An exception must be reduced to writing when taken, or leave must be obtained to afterward state it in writing.

SAME.—A plaintiff can not state one cause of action and recover upon another.

From the Jefferson Circuit Court.

*J. Roberts, E. R. Wilson and J. Francisco, for appellant.
J. W. Linck, C. E. Walker and W. S. Roberts, for appellee.*

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ELLIOTT, J.—Appellant was the plaintiff below, and sought a recovery for injuries to his property, alleged to have resulted from the wrongful acts of appellee, in improving streets and constructing drains and culverts. Upon the close of appellant's evidence, the court, on motion of the appellee, instructed the jury to return a verdict in favor of the latter. The appellee demurred to each of the three paragraphs of the appellant's complaint, and these demurrs were overruled. Appellant assigns error upon the ruling denying his motion for a new trial, and appellee has assigned cross errors upon the overruling of the demurrs to the complaint.

Counsel have argued the sufficiency of the complaint, upon the theory that if there was a bad complaint it is immaterial whether there was or was not error in overruling appellant's motion for a new trial. We need not decide whether this is or is not a correct doctrine, but, as it is a more convenient method of considering the principal question in the case, we shall first consider the ruling upon the demurrs.

The first paragraph of the complaint alleges that the appellant was the owner of certain real estate in the city of Madison; that, to quote the language of the complaint, “the defendant, not regarding the rights of the plaintiff in the premises, constructed, and caused to be constructed, on and along the streets in said city lying north of plaintiff's premises, ditches and drains, so as to gather together out of their natural and proper channels, and accumulate into one body and stream, all the water for a long distance, northwardly and westwardly of plaintiff's property, to wit, for the distance of two hundred yards, and did also construct and maintain a culvert under and across said street north of and upon the high ground running northwardly from said lots, in such a manner that said waters, so accumulated and collected out of their natural course and channels, were made to and did overflow” plaintiff's property.

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The second paragraph, after alleging ownership and situation of appellant's property, avers "That, north of said lots of plaintiff, there was and still is a street, under the control and supervision of the defendant, upon ground much higher than plaintiff's lots; that defendant, in constructing and repairing said street, has diverted the water on the north side of said street from its natural channel and courses, and caused the same to flow down said street on the north side thereof, until opposite said lots, where it was discharged into a small culvert or passage way, constructed by defendant, under and across said street, toward plaintiff's lot, but which said culvert or passage way had for a long time been closed, so that but little water passed through and upon the lots of plaintiff, so that the quantity discharged through the same passed off to a natural stream south of said lots, without doing any material damage to plaintiff's lots; that afterward defendant caused said ditches to be widened, extended and deepened, so as to accumulate a larger body of water on the north side of said street than would naturally flow thereon, and also caused said culvert or passage way to be reconstructed upon a greatly enlarged scale, and constructed the same very much larger than it ever was before, and thereby permitted and caused every time it rained a much larger quantity of water to flow through the same, and thus cast it upon plaintiff's lots."

The third paragraph, after alleging ownership and describing plaintiff's property, proceeds as follows: "Thus defendant, in constructing a street northwestwardly from said lots, and running near them on ground much higher than said lots, had so constructed the drains and culverts under said street southwardly towards the same as to wrongfully collect a large body of water, whenever it rained, on the north side of said street, and instead of permitting it to flow and pass off in its natural courses, to flow through said culvert and discharge its currents over and upon the plaintiff's lots."

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We have copied, from the various paragraphs of the complaint, all the allegations charging, or attempting to charge, an actionable wrong against the appellee, omitting the merely formal parts and the allegations of loss and injury.

The argument of appellee attacks the complaint upon the ground that it fails to show any facts constituting culpable negligence upon the part of the municipal authorities. In answering the appellee the appellant insists that the acts of the city authorities were of such a character as constituted a taking and appropriation of appellant's property within the meaning of the constitution, and cases are cited lending the position some support. *Inman v. Tripp*, 11 R. I. 520, S. C., 17 Albany L. J. 12, is, as counsel assert, a strong case in appellant's favor, but the force of that case is very greatly weakened, if not altogether broken down, by the later case of *Wakefield v. Newell*, 12 R. I. 75. It is not, however, necessary to discuss this point at length, for it is the firmly settled law of this State that consequential damages, resulting from the grading of a public street, do not constitute a taking or appropriation of property, within the meaning of the constitution. *Macy v. The City of Indianapolis*, 17 Ind. 267; *The City of Lafayette v. Bush*, 19 Ind. 326; *The City of Vincennes v. Richards*, 23 Ind. 381; *Snyder v. The President, etc.*, 6 Ind. 237. The doctrine of these cases is sustained by the overwhelming weight of authority, and is founded upon fundamental principles.

The appellee argues with much ability, that the complaint is bad because it does not charge that the municipal authorities were guilty of negligence in making the changes and improvements which caused the injury for which a recovery is sought. It is contended that the municipal authorities had a right to make the improvements described in the complaint, and that, if they acted with reasonable care the corporation is not responsible for consequential damages to the adjacent property. It is true, as appellee maintains, that

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where the improvement is one which the city has authority to make, and reasonable care is used in doing the work, no liability attaches, although injury may be done to the property of adjacent proprietors. . The cases cited from our own reports fully establish this doctrine, and they are in harmony with the almost unbroken current of authority. Dillon Municipal Corporations, sec. 990, and note. The rule under mention prevails where there is no statutory provision declaring a different one, and our statute does not, it is obvious, apply to such a case as that which, as appellant contends, the present complaint makes. The rule pronounced in *The City of Logansport v. Pollard*, 50 Ind. 151, does not apply to a case of such a character as that which now occupies our attention.

The question of negligence or no negligence is to be determined from the facts pleaded, and the presence or absence of general epithets adds no real force to the facts stated. If the facts stated are sufficient to show negligence, the absence of epithets does not impair their force ; if they are not sufficient, no mere epithets can supply the want. The question is here, as in all cases, do the facts pleaded show that the appellee was guilty of actionable negligence?

The case of *Inman v. Tripp*, *supra*, is much relied upon by the appellant, but upon the point under immediate consideration, as upon the preceding one, the force of the opinion is much impaired by the subsequent holding in the later case of *Wakefield v. Newell*. In the last case the court said : "In *Inman v. Tripp*, 11 R. I. 520, we did not mean to decide that a town or city has any less power over its streets or highways, in respect of surface-water, than an individual has over his own land, but only that it has no greater power." The case so confidently built upon can not, therefore, be allotted the force attached to it by appellant. While it is true that the case does not go quite so far as counsel claim, it nevertheless does hold that a municipal

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corporation has no right to collect surface-water in a channel and pour it upon the land of another, and to this extent the later case expressly approves the earlier.

In *Ashley v. The City of Port Huron*, 33 Mich. 296, it was held that a municipal corporation is liable for constructing a sewer in such a manner as to collect large quantities of water and flow it upon plaintiff's land. In the case last named, the distinction between consequential and direct injuries is clearly and forcibly drawn, as well as the distinction between legislative and ministerial acts. The question under discussion received a very full and careful examination in *Wilson v. City of New Bedford*, 108 Mass. 261, and it was there held that the city was liable for damages caused by the escape of water from an artificial reservoir in which it had been collected by the municipal authorities. In *Rylands v. Fletcher*, L. R., 3 E. & I. Ap. Cas. 330, water had been collected in an artificial reservoir, from which it flowed into plaintiff's mine, and it was held that an action would lie. It was there said by Lord CRANWORTH: "If a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril." In *Gillison v. City of Charleston*, 16 W. Va. 282, it was held that an action would lie against a municipal corporation for collecting and casting surface-water in a body upon the lands of an adjacent owner.

The Supreme Court of Illinois has declared and enforced the same doctrine in quite a number of cases. *The City of Aurora v. Reed*, 57 Ill. 29; *The City of Dixon v. Baker*, 65 Ill. 518; *City of Jacksonville v. Lambert*, 68 Ill. 519; *City of Aurora v. Gillett*, 56 Ill. 132.

The subject came under review in *O'Brien v. City of St. Paul*, 25 Minn. 331; S. C., 33 Am. R. 470. A distinction was there drawn between the cases where the effect of grading and improving was to throw surface-water on the lands of others, but where there was no confinement in chan-

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nels, and those in which surface-water was collected in artificial channels, and thereby caused to flow in a body upon the lands of others, and it was held that a municipal corporation may not collect surface-water in artificial channels and pour it upon the property of adjacent proprietors. The courts of Iowa and Wisconsin have sanctioned the general doctrine declared in the case last cited. *Ellis v. Iowa City*, 29 Iowa, 229; *Templin v. Iowa City*, 14 Iowa, 59; *Ross v. The City of Clinton*, 46 Iowa, 606; *Pettigrew v. The Village of Evansville*, 25 Wis. 223.

EARL, J., in *Lynch v. The Mayor, etc.*, 76 N.Y. 60, examines and distinguishes between the cases decided by the Court of Appeals, placing in one class *Byrnes v. The City of Cohoes*, 67 N.Y. 204, and *Bastable v. City of Syracuse*, 8 Hun, 587, and in another class cases such as *Wilson v. The Mayor, etc.*, 1 Denio, 595, and *Mills v. The City of Brooklyn*, 32 N.Y. 489, and expressly approves the doctrine laid down by each class. In concluding his examination of the cases, the learned judge said: "Each owner may improve his lot, and protect it from surface-water. He may not collect such water into a channel, and throw it upon his neighbor's lot." The rule as approved by the New York courts is thus stated in *Byrnes v. The City of Cohoes*: "Diverting the water from its natural course so as to throw it upon the plaintiff's premises, without providing any outlet, and thus injuring his building, was a wrong for which he was entitled to redress. The cases cited on the part of the appellant to the effect that a municipal corporation is not liable for an omission to supply drainage or sewerage, do not apply to a case where the necessity for the drainage or outlet is caused by the act of the corporation itself."

The cases are, however, not harmonious. There is indeed, a stubborn conflict; but the weight of authority is strongly in favor of the doctrine, that a municipal corporation has no right to collect surface-water in an artificial channel, and

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cast it in a body upon another's land. Judge DILLON has given the subject some consideration, and, as the result of his research and deliberation, states this conclusion : "There will be a liability if the direct effect of the work, particularly if it be a sewer or drain, is to collect an increased body of water, and to precipitate it on to the adjoining private property, to its injury. But since surface-water is a common enemy, which the lot-owner may fight by raising his lot to grade, or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface-water in its streets as the adjoining private owner, it is not ordinarily, if ever, liable for simply failing to provide culverts or gutters adequate to keep surface-water off from adjoining lots *below grade*, particularly if the injury is one which would not have occurred had the lots been filled so as to be on a level with the street." 2 Dillon Municipal Corp., 3d ed., sec. 1051. This we regard as a clear and correct statement of the rule supported by the decided weight of authority.

While the precise question presented has never been expressly decided by this court, yet there are several cases declaring substantially the same general doctrine as that contained in the cases to which we have here given our approval. In *Templeton v. Voshloe*, 72 Ind. 134, it was held that one land-owner had no right to collect water in an artificial channel and cause it to be discharged in a body upon another's land. In *The Cairo, etc., R. R. Co. v. Stevens*, 73 Ind. 278, it was held that a land-owner had a right to fight off surface-water from his own land. The decision in *Taylor v. Fickas*, 64 Ind. 167, is to the same effect. *Schlichter v. Phillip*, 67 Ind. 201, holds that, for obstructing a natural watercourse, an action will lie, but that no action will lie for obstructing, on land owned by the person who erects the obstructions, the natural flow of surface-water. The conclusion fairly deducible from our own cases accords with the

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rule which we have already stated as that maintained by the great weight of authority.

The facts stated in one paragraph, at least, of the complaint are, therefore, to be regarded as showing, not a mere consequential injury, resulting from the exercise of a lawful power, but a direct injury by confining in an artificial channel, and pouring upon appellant's land, the surface-water which, before the construction of the drains, flowed off without injury to the plaintiff's property.

It is, however, argued by the appellee, that the municipal authorities did construct a culvert, and that, as it is not shown that there was any negligence or unskillfulness, there is no liability. It is said by counsel that a municipal corporation is not liable for a mere defect in the plan of its public work, but solely for negligence in doing the work. Judge DILLON says: "Where the injury is occasioned by the *plan* of the improvement, as distinguished from the mode of carrying the plan into execution, there is not ordinarily, if ever, any liability." 2 Dillon Municipal Corporations, sec. 1051, 8d ed. This doctrine is probably that of the majority of the adjudged cases, and if we are to understand that it refers to the mere plan of the improvement, without reference to the performance of work under it, there can be no question as to the correctness of the rule as stated. There is, however, a broad and plain distinction between judicial or legislative acts and ministerial ones. The construction of a plan may be a judicial act; the performance of the work is certainly a ministerial act. This court has repeatedly recognized and enforced the doctrine, that a municipal corporation is not liable for the exercise of a legislative power, but that it is liable for the negligent performance of ministerial acts. *Stackhouse v. The City of Lafayette*, 26 Ind. 17; *The City of Logansport v. Wright*, 25 Ind. 512; *Roll v. The City of Indianapolis*, 52 Ind. 541.

The question in the present case is whether the acts

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charged in the complaint show merely the exercise of legislative power in devising a plan, or whether they are to be regarded as showing negligence or want of skill in the ministerial work of constructing the culvert. It is certain, from the facts alleged in at least one of the paragraphs of the complaint, that the culvert was of insufficient capacity; and it is equally certain that the municipal authorities had collected and confined, in artificial channels, great bodies of water, and caused them to flow in one volume to this insufficient culvert. As clearly appears from the cases we have cited, the collection of the water into one channel, and causing it to flow upon another's land, is an actionable injury. It is certainly a ministerial and not a legislative or judicial act. In this case, however, as one at least of the paragraphs of the complaint shows, the insufficiency of the culvert, and not the collection of the waters into one body, was the proximate cause of the injury. It is not alleged that there was any defect in the mechanism of the culvert, but it is charged that the size was inadequate to carry off the volume of water which had been collected and conducted to it by the municipality. The case of *City of Indianapolis v. Huffer*, 80 Ind. 235, is in point in appellant's favor, for it was there held that "The skill and care which is incumbent relates as well to the capacity of the sewer as to the mere mechanism in its construction—as well to its plan as to its execution."

The appellee assails this case with vigor and ability, and it is maintained that a mistake as to the plan never creates a liability. The appellee barely notices, neither approving nor condemning, the case of *The City of Indianapolis v. Lawyer*, 38 Ind. 348, and yet that case is quite as strongly against it as the earlier one. It was there held, "that as the city had accumulated, by its system of drainage, such vast quantities of water at the point in question, it would be under obligation to see to it that there was a way provided for the

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water to escape without damage to adjoining property owners.' In *The City of Indianapolis v. Tate*, 39 Ind. 282, the case from which we have quoted is fully approved. It is true that the cases we have cited are not very easily reconciled with the earlier case of *The City of Vincennes v. Richards*, 23 Ind. 381, but the facts are there so meagrely stated that we can not determine whether the water was gathered into one channel and thus cast upon the plaintiff's land, or whether the corporation merely fought the surface-water off of its own streets. At all events, the later cases expressly consider and decide the precise point now under discussion, and must be regarded as expressing the rule of law governing all actions of like character. Outside of our own State, the authorities upon this subject are in hopeless conflict. There is one point upon which all are agreed, and that is, that for a defect in the mere plan or system there is no liability so long as the ministerial work of carrying into effect the plan is not undertaken. There are many and respectable authorities sustaining the view adopted by this court. The opinion of Judge Dillon, announced after a careful, exhaustive and discriminating review of all the authorities, is in substantial harmony with that prevailing in our State. Says this learned author in the last edition of his great work: "It is, perhaps, impossible to reconcile the cases on this subject, and courts of the highest respectability have held that if the sewer, *whatever its plan*, is so constructed as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water which would not otherwise have flowed or found its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles and will have a salutary effect in inducing care on the part of the municipality to avoid such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are

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inflicted." 2 Dillon Municipal Corporations, sec. 1047. Justice requires that a municipal corporation which collects into one channel and conducts a great body of water to the lands of another should provide suitable outlets for it, and not cast it upon such land. Whether the failure to provide means of escape is due to the inadequacy in size of culverts or sewers, or to the defective mechanism, is not material. The duty of the corporation is to provide proper means of escape, and this duty extends both to capacity and mechanism. It is stretching the doctrine of immunity from liability for consequential injuries to an unwarranted extent to hold that if the mechanism is perfect, there is no responsibility, no matter how greatly disproportionate and inadequate the size and capacity of the culvert is to the volume of water led to and poured against it by the drains of the municipality. It is the plain duty of the corporation, when it confines water in one channel, to see to it that suitable provision is made for the escape of the water into natural watercourses or other channels which will carry it off without injury to private property.

The complaint does not state a cause of action for obstructing a natural watercourse. There was no existing watercourse within the meaning attached to that term by courts and law-writers. A watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel, with bed and banks. It is not necessary that the water should flow continually; the channel may sometimes be dry. There must, however, always be substantial indications of the existence of a stream, which is ordinarily and most frequently a moving body of water. *Luther v. The Winnisimmet Co.*, 9 Cush. 171; *Fryer v. Warne*, 29 Wis. 511; *Schlichter v. Phillip*, *supra*. There is nothing showing that there was an obstruction or diversion of any natural watercourse. If a natural watercourse is wrongfully obstructed then there is a plain liability.

Tested by the principles we have declared to be correct,

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one at least of the paragraphs of the appellant's complaint must be held good. The paragraph which we deem sufficient is the first. Although not well drawn it still shows with reasonable certainty that the municipal authorities did collect in one channel the surface-water falling upon divers streets, and flow it against, rather than through, an insufficient culvert, and thus wrongfully cast the water in one body upon the private property of the appellant. We have concluded, not without much hesitation, that the second and third paragraphs can not be upheld, and we therefore adjudge them bad.

We come now to the questions presented by the errors alleged upon the ruling denying appellant's motion for a new trial. There are cases where the court may rightfully direct a verdict. A judge is not bound to submit a question to a jury, where their verdict, if contrary to his views of the testimony and its legal effect, would be certainly set aside, as clearly against the law and the evidence. *Dryden v. Britton*, 19 Wis. 31; *Godin v. The Bank*, etc., 6 Duer, 76; *Lane v. Old Colony*, etc., *R. R. Co.*, 14 Gray, 143; *Improvement Co. v. Munson*, 14 Wal. 442; *Jewell v. Parr*, 13 C. B. 909; *Parks v. Ross*, 11 How. 362; *Pleasants v. Fant*, 22 Wal. 116; *Dodge v. Gaylord*, 53 Ind. 365, 377.

Courts do not, however, undertake to weigh evidence for the purpose of ascertaining in whose favor it preponderates, nor do they undertake to pass upon questions affecting the credibility of witnesses. In short, they interfere only in cases where it is manifest that there is no evidence upon which a verdict could legally rest. Our inquiry then is, not what was the degree or weight of the testimony introduced by the appellant, but was there any evidence sustaining the material facts constituting his alleged right of action? Appellant thus presents his claim:

"We think that the evidence shows, by a fair preponderance, the following state of facts:

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"1st. That, before the improvements and enlargement of the culverts and drains testified about and complained of, the plaintiff suffered no material damage from overflow. The witnesses, almost to a man, say that they heard no complaint from anybody until after the action of the city in enlarging the culverts, etc. ; and it is reasonable to presume from the evidence that there was no damage before this, from the fact that there was a drain or sewer connecting the old culvert with "Crooked Creek," the outlet of the water across plaintiff's lot, of the same size as the old culvert ; whereby it would seem impossible for the premises to have been overflowed before the enlargement, as this connecting sewer, being of the same size as the old culvert, would naturally carry off all the water. But, at any rate, we think the evidence shows that there was no material damage until after the action of the city in the premises.

"2d. The evidence shows, by a fair preponderance, that before the action of the city, etc., the natural tendency of the water from the ravine and gutters was to flow eastwardly of the plaintiff without damage to him ; or, at all events, whatever may have been its outlet, there was no damage to plaintiff of consequence on account of it.

"3d. It appears fairly from the evidence, that the plaintiff's property is situated in the bottom below the culvert and Michigan Road, and that the hills rise high on the north side of it ; that, in times of rain, the water comes down the ravine in 'immense quantities,' 'sufficient to carry a horse off his feet ;' that, according to the admissions of defendant in her answer, the point complained of by plaintiff is at the foot of the 'high hills' surrounding the city of Madison."

We shall notice and dispose of these points in the order in which they are presented :

1st. The corporation, by merely making the culvert larger, did not invade any rights of the appellant. The corporation had the same rights to conduct from its streets

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surface-water as an individual has to conduct surface-water from his lands. It does not appear that the city had collected the surface-water into one body and caused it to flow to this culvert. Upon the contrary, the clear inference—the only reasonable inference—is, that the city officers had done nothing more than repair the public streets, in a lawful and careful manner. The city had an undoubted right to fight surface-water from the public highways, and, for this purpose, might build embankments or enlarge outlets. Corporations, as we have already seen, are only liable in cases where they collect the surface-water into an artificial channel, and pour it in a body upon the property of another. It does not appear but that the change in the adjacent country caused the increased flow of surface-water; at all events, it does not appear that the city had wrongfully invaded the rights of the appellant.

2d. It may be true that the evidence does tend to show that the repair of the streets did change the flow of the water. If this were fully granted, it would not make a case for the appellant. No action will lie for merely elevating or depressing land, and thus changing the flow of surface-water. A municipal corporation is entitled to exercise dominion over the public highways, and is not liable for so exercising this right as to change or divert the flow of surface-water. The rule upon this subject is thus expressed by BIGELOW, C. J., in *Gannon v. Hargadon*, 10 Allen, 106. "The obstruction of surface-water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil." In *Hoyt v. The City of Hudson*, 27 Wis. 656, S. C., 9 Am. Rep. 473, it was held that a municipal corporation had the same rights to divert or obstruct the flow of surface-water as a natural person, and that, for an obstruction or diversion caused by the grading and improvement of

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streets, there is no liability unless negligence is shown. But we need not multiply citations, for the question may be regarded as fully settled by the decisions of this court. In the most recent of our cases, the court approved and adopted Judge DILLON's doctrine, laid down in section numbered 1039 of the last edition of his work on municipal corporations. *The Cairo, etc., R. R. Co. v. Stevens, supra.*

3d. We can not understand what benefit the appellant can reasonably expect from the facts which he assumes in his third proposition were established by the evidence. If it is meant that the facts stated entitled him to a recovery upon the ground that the city authorities had obstructed or interfered with a natural watercourse, then the conclusion is erroneous, because no facts are stated in the complaint showing that there was any natural watercourse. A plaintiff can not state one cause of action and recover upon another. The facts assumed do not, however, show that there was any natural watercourse. Ravines, through which surface-water runs in times when there are heavy rainfalls, are not natural watercourses. To constitute a natural watercourse, there must be a bed and banks and evidences of a permanent stream of running water. *Hoyt v. The City of Hudson, supra; Howard v. Ingersoll*, 13 How. 381, 427. Nor is there anything in the facts stated showing that appellee had any agency in bringing the water from the high hills north of appellant's lots. If the evidence shows anything materially affecting the case, it is directly and strongly against appellant, for the reason that it shows that the water came upon appellant's lot because of its being below the level of the surrounding lands. If the water did flow upon his lot because of its being below the level of adjacent streets or lots, there could be no recovery. We are satisfied that the court did right in directing a verdict for the appellee.

Following the order of discussion pursued by counsel, we come now to the remaining point made by appellant. It is

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insisted that the court erred in excluding certain testimony offered by the appellant. The question, as to whether there was or was not error in excluding this testimony, is not properly before us, for the reason that the exception was not reduced to writing, nor was any time asked or granted in which to put it in writing. An exception must be reduced to writing when taken, or leave must be obtained to afterward state it in writing. *Sohn v. The Marion and Liberty Gravel Road Co.*, 73 Ind. 77; *Goodwin v. Smith*, 72 Ind. 113.

The judgment is affirmed, with costs.

No. 7684.

FOGLESONG v. WICKARD, ADMINISTRATOR.

DECEDENTS' ESTATES.—Promissory Note.—Contract.—Parol Agreement.—Executed Gift.—Practice.—Demurrer.—Legal Conclusion.—Right of Administrator to Sue.—In an action by an administrator upon a note executed to his decedent, the defendant answered that the note was executed by him to his father, the decedent, for the purchase of his real estate, with the agreement that only the interest and such parts of the principal as should become necessary should be paid to the defendant's father and mother during their lives, and that after the death of both he should pay the note to his sisters, or their children; that his mother is living, and entitled to receive the interest on the note.

Held, that, as the note was absolute and unconditional in its terms, it could not be varied or contradicted by proof of contemporaneous verbal agreements.

Held, also, that the note did not constitute an executed gift in favor of the daughters, to whom it is alleged it was agreed to be paid.

Held, also, that so long as the note remained in the hands of the deceased, to whom it was payable, it was absolutely his property, and, so remaining until his death, went to his administrator to be collected as part of the assets of the estate.

Held, also, that the allegation, that the widow had a right to the possession of the note, is not an averment of fact which the demurrer admits, but is a statement of a legal conclusion.

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Held, also, that the administrator alone was entitled to take possession of and enforce the contract according to its terms.

From the White Circuit Court.

D. P. Baldwin and *D. D. Dykeman*, for appellant.

R. Magee and *S. T. McConnell*, for appellees.

Woods, J.—The appellee, as administrator of the estate of Daniel Foglesong, Sr., sued the appellant upon a promissory note made by the appellant to the deceased. Error is assigned upon the action of the court in sustaining a demurrer, for want of facts, to the fourth, fifth and seventh paragraphs of answer. These paragraphs are, in all essential respects, the same as the sixth, to which the demurrer was overruled. None of them show a complete defence to the entire cause of action, though pleaded as such, and the partial payments alleged in them were provable under the second paragraph, which is a plea of payment.

Except as they show partial payment, the substance of the answers in question is, that the deceased, being old and desiring to make a division of his property among his children, conveyed his real estate to the appellant and another son, and, allowing each of them a credit for his share in the estate, took their respective notes for the remainder of the estimated value of the land ; that, for the land so conveyed to him, the appellant gave the note in suit, but that it was the agreement that only the interest and such parts of the principal as should become necessary should be paid to the appellant's father and mother during their lives, and that, after the death of both his father and mother, he should pay the note to two of his sisters, who are named, or to their children ; that his mother is living, and entitled to receive the interest on said note.

The note sued on is absolute and unconditional in its terms, given for a definite sum, made payable to the deceased on a day named. The answer shows, what would

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otherwise be presumed, that it was executed for a valuable and adequate consideration. The alleged defence is clearly obnoxious to the rule which forbids the proof of contemporaneous verbal agreements in contradiction of the terms of a written agreement. *Odam v. Beard*, 1 Blackf. 191; *Welshbillig v. Dienhart*, 65 Ind. 94.

The note did not constitute an executed gift in favor of the daughters to whom it is alleged it was agreed to be paid, and so long as it remained in the hands of the deceased, to whom in terms it was payable, it was absolutely his property, and, so remaining until his death, went to his administrator to be collected as a part of the assets of the estate.

The averment that the widow took and had a right to the possession, after the husband's death does not affect the question. The allegation, that she had a right to the possession, is not an averment of fact, which the demurrer admits, but simply the statement of a legal conclusion, which is not a correct conclusion. The administrator alone was entitled to take possession of and to enforce the contract according to its terms. *Fankboner v. Fankboner*, 20 Ind. 62; *Miller v. Goldthwait*, 37 Ind. 217; *Barnes v. Bartlett*, 47 Ind. 98.

The judgment is affirmed, with costs, and with two per centum damages.

No. 9554.

McCLARY v. THE STATE.

CRIMINAL LAW.—Grand Jury.—Challenge to Array.—A challenge to the array of a grand jury must be supported by affidavit, setting forth the causes therefor.

SAME.—Plea in Abatement.—Challenge.—A plea in abatement, seeking to attack the manner in which a grand jury was organized, must show

75	280
147	10
75	280
148	245

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not only that the question presented by it was not raised by a challenge to the array, but also that the defendant had no suitable opportunity of challenging the array.

SAME.—Where a defendant has challenged the array of a grand jury, alleging certain facts in support thereof, he can not afterward plead the same facts in abatement.

PRACTICE.—*Continuance.*—*Illness of Attorney.*—The propriety of a postponement of a trial on account of the illness of one of the attorneys of a party is largely in the discretion of the trial court, and unless there has been an abuse of that discretion, no error is committed in refusing a postponement.

SAME.—*Questions to Witness.*—*New Trial.*—The mere asking of improper questions of a defendant, who was a witness in his own behalf, does not afford a sufficient reason for a new trial.

SAME.—*Juror Asleep During Argument.*—The mere falling asleep, for a short time, by a juror, during the argument of counsel for the defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial.

SAME.—*Sending Jury Out to Deliberate upon Verdict.*—Sending out a jury at ten o'clock at night to deliberate upon their verdict, is a matter within the discretion of the court, and no available error is committed thereby unless there is shown to have been an abuse of that discretion.

SAME.—*Surprise.*—The failure of counsel for the State to produce at the trial the knife with which the prosecuting witness was wounded, and “false testimony given upon the trial concerning the length and character of such knife,” do not constitute such surprise as would authorize the granting of a new trial.

SAME.—*Misconduct of Jury.*—*Bailiff in Jury Room During Deliberations.*—*Insufficiency of Affidavit.*—An affidavit, filed in support of a motion for a new trial on account of the misconduct of the jury, in permitting their bailiff to be present during their deliberations, which states “that the bailiff told the affiant that he was in the jury room the greater portion of the time while the jury were in consultation,” is insufficient to prove that the bailiff was in the room as alleged.

SAME.—*Instructions.*—Where the court sufficiently instructs the jury as to what was necessary to make out the crime charged, but was not asked to, and did not, instruct the jury as to the lesser offences of which the defendant might be convicted, no error is committed of which the defendant has reason to complain.

From the Huntington Circuit Court.

A. Moore, for appellant.

*D. P. Baldwin, Attorney General, and C. W. Watkins,
Prosecuting Attorney, for the State.*

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NIBLACK, J.—William McClary, the appellant, was, at the October term, 1880, indicted for an assault and battery upon one Charles V. Jones with the intent, maliciously and pre-meditatedly, to kill and murder him, the said Jones. A jury found him guilty as charged, fixing his punishment at a fine of one dollar and imprisonment in the State's prison for a term of two years. A motion for a new trial being first considered and denied, judgment followed upon the verdict.

At the commencement of the term of court at which the indictment was returned, the appellant was in the custody of the sheriff upon a charge of the offence for which he was afterward tried and convicted, as above stated, and when the grand jury was called he challenged the array orally upon the ground that the grand jurors then called had constituted the grand jury of the two preceding terms, and had been superseded by other grand jurors, selected for the term of court then in session, but who had not been summoned to attend as such grand jurors at that term. The court overruled the appellant's challenge to the array and empanelled the grand jury, and it was this grand jury which returned the indictment against the appellant. The appellant then pleaded the facts relied upon in support of his challenge to the array in abatement of the indictment, and the court sustained a demurrer to his plea.

The only errors assigned in such a way as to require our attention are :

1st. Upon the overruling of the challenge to the array of the grand jury ;

2d. Upon the sustaining of the demurrer to the plea in abatement ;

3d. Upon the refusal of the court to grant a new trial.

The act concerning grand juries, 2 R. S. 1876, p. 419, sec. 11, provides that "No challenge to the array of any grand jury shall be allowed, unless such challenge be supported by affidavit setting forth the causes therefor." In this case,

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no affidavit was filed setting forth the causes relied upon in support of the challenge to the array, but only an oral statement of the causes thus relied upon was made to the court. The court, therefore, did not err in overruling the challenge to the array of the grand jury.

Moore, in his treatise on criminal law, at section 140, says: "Pleas in abatement are not favored in law, nor are presumptions of fact indulged in their favor, but they must state every fact necessary to their sufficiency: and a plea in abatement that fails to show why the objection to the grand juror was not or could not have been made by way of challenge is bad, and a demurrer to it will be sustained."

It has been settled by this court, that where the question of the legality of the organization of a grand jury has been raised by a challenge to the array, the defendant is not allowed to again present the same question by plea in abatement. *Meiers v. The State*, 56 Ind. 336; *Ward v. The State*, 48 Ind. 289; *Hardin v. The State*, 22 Ind. 347. Consequently, a plea in abatement, seeking to attack the manner in which a grand jury was organized, must show not only that the question presented by it was not raised by a challenge to the array, but also that the defendant had no suitable opportunity of challenging the array. The appellant, having challenged the array, alleging certain facts in support of his challenge, could not afterward plead the same facts in abatement. The demurrer to the plea in abatement was, therefore, correctly sustained.

The causes assigned for a new trial, upon which questions are presented for our decision, may be enumerated as follows:

1st. That the verdict was not sustained by sufficient evidence;

2d. That the court erred in refusing to postpone the trial on account of the illness of one of the appellant's attorneys,

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and in requiring the appellant to go to trial on the next day after the motion to postpone was overruled ;

3d. Because of the alleged misconduct of the prosecuting attorney, in asking the appellant, on his cross-examination, whether he had not committed other offences previous to the time of the commission of the supposed crime for which he was on trial ;

4th. Because one of the jurors went to sleep while one of the appellant's attorneys was addressing the jury ;

5th. Because the court sent out the jury to deliberate upon their verdict at 10 o'clock at night ;

6th. Because of surprise at the failure of counsel for the State to produce the knife with which the prosecuting witness was wounded, at the trial, and at false testimony given upon the trial concerning the length and character of such knife ;

7th. Because of misconduct of the jury, in permitting their bailiff to be present in their room during the greater portion of the time they were engaged in deliberating upon their verdict ;

8th. Because the court failed to instruct the jury as to what constituted murder in the second degree, and as to the law defining voluntary manslaughter.

As to the first cause for a new trial, the evidence appears to us to have fully sustained the verdict.

As to the second cause, the propriety of a postponement, on account of the illness of one of the attorneys, raised a question largely in the discretion of the court. The appellant had more than one attorney already employed, and there is nothing in the case indicating to our minds any abuse of discretion by the court in refusing the postponement.

As to the third cause, the court overruled all the questions put to the appellant concerning his commission of offences other than the one for which he was then on trial. The mere

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asking of improper questions does not afford a sufficient reason for a new trial.

As to the fourth cause, it may be said that the mere falling asleep for a short time, by a juror, during the argument of counsel for the defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial. But, aside from this view of the supposed irregularity complained of, the affidavit filed in support of this cause did not aver that the juror actually fell asleep, but only that he had his eyes closed, and appeared to be asleep.

In respect to the fifth cause, it may be stated that the sending out of a jury at 10 o'clock at night was a matter which also rested upon the discretion of the court, and nothing has been shown manifesting an abuse of discretion in that respect in this particular case.

As regards the sixth cause, we know of no rule recognizing the kind of surprises set up by it as causes for a new trial.

The evidence showed that the knife was not in the possession or under the control of the prosecuting attorney at the time of the trial, and if it had been it would have been a matter for him to decide as to whether it should have been put in evidence by the State. His failure to put it in evidence was at most a matter for comment before the jury.

Both parties gave evidence as to the size and kind of knife which the appellant used in his assault upon the prosecuting witness. If some of the statements of witnesses on behalf of the State were fanciful and extravagant, that did not constitute such a surprise as would have justified the court in granting a new trial.

The presence of the bailiff in the jury room, after the jury have retired for deliberation, has been held by this court to be a good cause for a new trial. *Rickard v. The State*, 74 Ind. 275.

But the affidavit filed in support of the seventh cause for a new trial does not directly aver that the bailiff was in the

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room with the jury, but only that, after the jury were discharged, the bailiff told the affiant that he was in the jury room the greater portion of the time while the jury were in consultation. This was only hearsay evidence of an alleged fact, and did not support the positive allegation that the bailiff was in the room with the jury during their deliberations.

The court instructed the jury quite sufficiently as to what was necessary to make out the crime charged in the indictment, but was not asked to instruct, and did not instruct, the jury as to the lesser offences of which the appellant might have been convicted under the indictment.

As the appellant did not ask instructions to supply the omission, assigned as the eighth cause for a new trial, he has no reason to complain that the instructions given did not go as far as they might have gone. No error has been shown in the refusal of the court to grant a new trial.

The judgment is affirmed, with costs.

No. 8227.

BROWN v. SHIRK.

MORTGAGE.—*Foreclosure.—Purchase-Money.—False Representations.—Verdict.—Damages for Mortgagor.—Application of.—Notes Due and Not Due.*—Where, in an action to foreclose a mortgage to secure notes for purchase-money due and to become due, a verdict was returned for plaintiff and damages allowed defendant on answers of false representations and set-off, and the court, on plaintiff's motion, without objection, looked behind the verdict to ascertain how much was, and how much was not, due, and applied all, or nearly all, of defendant's damages to the notes not due, the judgment was erroneous.

SAME.—*Application of Credits.*—In such case, the defendant had a right to apply the damages found due to him; and, if the application devolved upon the court, it should have applied the amount to the discharge of the amount due the plaintiff.

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CREDITS, APPLICATION OF.—*General Payments.*—General payments are always applied on sums due, rather than sums not due.

From the Howard Circuit Court.

D. Moss and J. O'Brien, for appellant.

N. R. Lindsay, M. Bell, M. McDowell, H. J. Shirk and J. Mitchell, for appellee.

MORRIS, C.—This suit is brought to foreclose a mortgage, given to secure ten promissory notes. The complaint is in three paragraphs. The first states that, on the 12th day of February, 1876, the appellant executed his note to the appellee for three hundred dollars, with ten per cent. interest; that, at the same time, he executed a mortgage on one hundred and sixty acres of land, situate in Tipton county, to secure the same and nine other notes, executed by the appellant to the appellee. The second paragraph states that the appellant executed to the appellee nine notes, on the 12th day of February, 1876, due in two, three, four, five, six, seven, eight, nine and ten years, respectively, from date, the last of said notes calling for \$379.77, and each of the others for \$300, all bearing interest at the rate of ten per cent. per annum, payable annually, and with attorney's fees; that said notes, including the one mentioned in the first paragraph of the complaint, were given for the purchase-money of the land mentioned in the mortgage given to secure them, as stated in the first paragraph; that there was due on each note interest for one year, amounting in all to \$277.97. Copies of the notes and mortgage are filed with the complaint. It is averred that the mortgaged premises can not be divided without injury to the parties. The third paragraph is like the second, except that the facts are stated in greater detail.

The suit was commenced in Tipton county, and taken by change of venue to Howard county. The appellant answered in three paragraphs: 1st, the general denial; 2d, that the

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notes were given for land situate in the State of Arkansas, conveyed by the appellee to the appellant; that the latter was ignorant of the quality, situation and condition of said Arkansas land; that the appellee, to induce him to buy the land, made various false representations in regard to its situation and condition; that he relied upon such representations, and made the purchase; that the representations were false, and that he was thereby greatly deceived and damaged. The third paragraph alleged a set-off of some four hundred dollars.

The appellee replied to the second and third paragraphs of the answer by a general denial.

The cause was submitted to a jury, who returned a general verdict, in these words: "We, the jury, find for the plaintiff, and assess his damages at forty-one hundred and forty-one dollars and seventy-seven cents, less one thousand six hundred and twenty-five dollars, on the second paragraph of the answer, and seventy-one dollars and twenty-five cents on the third paragraph of the answer."

The appellant moved the court for a new trial, for the following reasons:

1st. Because the verdict was not sustained by the evidence;

2d. Because the damages were excessive;

3d. Because the court erred in the instructions given to the jury;

4th. Because the court erred in refusing to give certain instructions asked by the appellant;

5th. In refusing to suppress certain depositions.

The motion for a new trial was overruled.

The appellee moved the court for judgment, as follows: "Elbert Shirk *v.* Benjamin F. Brown.

"The plaintiff moves the court for judgment upon the verdict of the jury as follows, to wit: \$1,037.71, now due; \$135.37, due February 15th, 1880; \$135.37, due February,

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1881 ; \$135.37, due February 15th, 1882 ; \$135.37, due February 15th, 1883 ; \$135.37, due February 15th, 1884 ; \$135.37, due February 15th, 1885, and \$215.16, due February 15th, 1886. The amount now due to bear ten per cent. interest ; all the notes to become due to bear ten per cent. interest from this date, payable annually ; all without relief from appraisement law, and a foreclosure of the mortgage.

“SHIRK, MITCHELL ET AL., for plaintiff.”

The record then proceeds as follows :

“And the court being well advised of said motion sustains the same, to which ruling the defendant excepts and objects ; and on motion the court now renders judgment against said defendant.

“It is considered, adjudged and decreed by the court, that the plaintiff recover of said defendant said sum of \$1,037⁷¹₁₀₀ now due, without relief from valuation laws, with interest at ten per cent. per annum from the date hereof. And the further sum of \$135.37, due February 15th, 1880 ; and the further sum of \$135.37, due February 15th, 1881 ; and the further sum of \$135.37, due February 15th, 1882 ; and the further sum of \$135.37, due February 15th, 1884 ; and the further sum of \$135.37, due February 15th, 1885 ; and the further sum of \$215.16, due February 15th, 1886, with interest at ten per cent. per annum from the date of rendition on each of said sums respectively. And that he also have judgment of foreclosure of said mortgage executed by the defendant, Benjamin F. Brown, to the plaintiff, on the 12th day of February, 1876, on the following real estate : The northwest quarter of section 36, in township 22 north, of range 5 east, containing one hundred and sixty acres, more or less, all without relief from valuation laws ; and that said real estate, or so much thereof as may be necessary, be sold by the sheriff of Tipton county, as lands are sold on execution, without relief from valuation laws, and that the proceeds of said sale be applied to the payment of the costs of

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this suit, and then to the satisfaction of the amount of said judgment, and accrued interest then due; and if there remain an overplus the same shall be applied on the judgments not due in the order in which the same become due; and if there remains a surplus after paying all of said sums with interest and costs, the same shall be paid to the clerk of this court, subject to the further order of the court, and if said real estate shall not sell for a sum sufficient to pay and satisfy said judgments, interest and all costs in the cause, the amount so remaining shall be levied of any other goods, chattels, lands and tenements of said defendant, subject to execution. And it is further ordered by the court, that a copy of this decree, issued by the clerk of this court, under the seal thereof, shall be sufficient authority to said sheriff to make said sale, to all of which said defendant at the time excepts and objects."

The errors assigned are :

- First. The overruling of the motion for a new trial.
- Second. The rendition of judgment in favor of the appellee.

It is obvious, that, at the time the verdict was found and the judgment rendered, April 5th, 1879, the sum of the notes due, and to become due, including interest and attorney's fees upon the whole, could not have exceeded the sum which the jury found in favor of the appellee, \$4,141.77. If the verdict is to be construed as finding this sum as then due, it is clearly and palpably in defiance of the evidence, and it should be set aside for that reason. But if it shall be construed as finding the amount due and to become due, it is very nearly correct. The court below obviously so understood it. Treating the verdict as a finding of the amount due and to become due the appellee, and as sufficient in that respect, and the finding in favor of the appellant for the sum of \$1,696.25, there would be a balance to become due the appellee of \$2,465.52. If the amount thus found due

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the appellant should have been applied in payment of the amount *then* due the appellee, it became necessary for the court to find, what the jury had not found, the amount then due him. So, too, if the court adjudged that the amount due the appellant should be applied in payment of the notes not due to the appellee, it would have to look to the evidence, not to the verdict, to ascertain what was due, and how much was not due. This the court seems to have done without objection from either of the parties.

The only question which we shall examine is as to the application of the \$1,696.25, found due from the appellee to the appellant. The court below must have applied it all, or nearly all, to the payment of the notes not due.

We think the amount found due the appellant should have been applied to the amount found to be due the appellee, and not to the payment of what was not due. To apply it in payment of the sums not due, would be to compel the appellant to pay a debt before it was due. This the court had no right to do. *Skelton v. Ward*, 51 Ind. 46. The appellant had a right to have the amount due him applied in payment of the amount due the appellee. It was for him to apply the damages found due to him. If the application devolved upon the court, it should have applied it to the discharge of the amount due the appellee. It would be in the nature of an application of a general payment by the court. Such payments are always referred to a sum due, rather than to one not due. *Seymour v. Sexton*, 10 Watts, 255; *Bacon v. Brown*, 1 Bibb, 334; *Stone v. Seymour*, 15 Wend. 19; *Baker v. Stackpoole*, 9 Cow. 420.

We think the court erred in applying the amount found due the appellant to the sums not due the appellee, and that for this error the judgment below should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

Todd *et al.* v. Jackson.

No. 7893.

TODD ET AL. v. JACKSON.

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138 664

PARTNERSHIP.—*Ostensible Members of Firm.*—*Silent Partner.*—*Liability for Acts of Partner.*—*Conversion.*—*Evidence.*—Evidence, that property was received by one member of a partnership, under an agreement to sell it, for a commission of “what was right,” with property of the firm, and was by him mingled and sold with it, and the proceeds converted to his own use, such agreement being fairly within the scope of the business of the firm for years, and within the knowledge of the other members of the firm, ostensible and silent, supports a verdict and judgment against them for such conversion.

SAME.—*Scope of Partnership Business.*—*Instruction.*—On trial of an action against the firm for such conversion, it is not error to refuse to instruct the jury that, “In determining what comes within the scope of the partnership business, when there is a doubt about it, the rule which determines it rests upon the necessity of the case.”

SAME.—*Notice.*—*Contract.*—Where an agreement is in relation to a matter fairly within the scope of the partnership business, and made with a member of the firm, such agreement is binding on the firm in the absence of any evidence tending to show that the party contracting with such member had notice or knowledge that the contract was not, as it appeared to be, within the scope of the business of the firm.

SAME.—*Innocent Persons.*—*Cause or Occasion of Loss.*—Where one of two innocent persons must suffer by the act of a third person, he must suffer who has been the cause or occasion of the confidence and credit reposed in such third person.

PRACTICE.—*Supreme Court.*—*Assignment of Errors.*—Causes for a new trial can not be assigned in the Supreme Court as independent errors.

From the Wabash Circuit Court.

C. Cowgill, H. B. Shively, C. E. Cowgill and W. G. Sayre, for appellants.

J. D. Conner and J. D. Conner, Jr., for appellee.

Howk, C. J.—This case is now before this court for the second time. The opinion and judgment of this court in the cause, when it was first here, are reported under the name of *Jackson v. Todd*, 56 Ind. 406. On that appeal the judgment below was reversed, and the cause was remanded for a new trial. Without any substantial change in the issues, the new trial of the case, by a jury, resulted in

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a verdict for the appellee, the plaintiff below, and the appellants' motion for a new trial having been overruled, and their exception saved to this ruling, the circuit court rendered judgment on the verdict, and from this judgment the appellants, the defendants below, now prosecute this appeal in this court.

The appellants have here assigned as errors all the rulings of the trial court, adverse to them, but their learned counsel have, in argument, virtually waived all the errors assigned, except the last three, which were, in substance, as follows:

"7th. The court erred in refusing to give the instructions asked by defendant Todd ;

"8th. The court erred in giving the charges it did give, on its own motion, to the jury ;

"9th. The court erred in overruling the motion for a new trial."

Before proceeding to the consideration of any of the questions presented and discussed by the appellants' counsel, it is necessary to a proper understanding of those questions, and of our decision thereof, that we should give in this connection a brief statement of the facts of the case, as the same are shown by the record. In the opinion of the court in this cause, when it was first here, we gave a very full statement of the case, as made by the pleadings and evidence, and to that we now refer. *Jackson v. Todd, supra.* But it has seemed to us that this opinion would hardly be intelligible if we did not give therein a summarized statement of the facts of the case, substantially as given in the former opinion, as follows :

On, and for some years before, November 11th, 1873, the appellants, the defendants below, were, and had been, partners in business at the town of Lagro, one branch of their business being the buying of fat hogs and shipping them to a market. The appellants Todd and George W. Wright were the ostensible members of the firm, and the appellant Harvey

Todd *et al.* v. Jackson.

Wright was a silent partner, not known as such to the appellee, Jackson, until after the commencement of this suit. For some days immediately preceding November 11th, 1875, the appellee had endeavored to sell his fat hogs, which he had on hand, to the firm of Todd & Wright, but he was unwilling to sell for the price they offered. Finally, it was agreed by and between the appellant George W. Wright and the appellee, that Todd & Wright would receive the appellee's hogs and ship them with their own hogs, then on hand, and that the appellee would pay them therefor "what was right."

This agreement was made on the 8th day of November, 1875, and on the 11th day of the same month the appellee delivered his hogs to Todd & Wright, at their place of business, in Lagro, for shipment by them to Buffalo, New York, with the knowledge of the appellant Todd, who was present at the time and place of such delivery. The hogs of the appellee, on the day of their delivery at Lagro, were shipped by the appellants, Todd & Wright, with their own hogs, in the same railroad cars, to said city of Buffalo. The appellant George W. Wright went with the hogs to said city of Buffalo, and there sold them, and, after receiving the proceeds of such sale, absconded with the money, and had never accounted for or paid any part of said money either to his co-partners or to the appellee.

The appellee claimed that his agreement for the shipment of his hogs was made with said George W. Wright, as a member of said firm of Todd & Wright, and not as an individual, in reference to a matter fairly within the scope of the co-partnership business of said firm. While, on the other hand, the appellants, Todd and Harvey Wright, claimed that the shipment of hogs belonging to other parties was never any part of the business of said firm ; that they had nothing whatever to do with, and had no interest in, the shipment of appellee's hogs ; and that the appellee's shipment of his

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hogs was merely a private venture of the said George W. Wright, on his own account, under an agreement between him and the appellee.

With this statement of the facts of this case, and of the nature of the controversy between the parties, we proceed now to the consideration of the alleged errors complained of, in argument, by the appellants' counsel. Of these errors, the seventh and eighth are merely causes for a new trial, and therefore, as this court has often decided, they were not properly assigned here as independent errors. *Freeze v. De Puy*, 57 Ind. 188; *Walls v. The Anderson, etc., R. R. Co.*, 60 Ind. 56. If these supposed errors were not assigned by the appellants as causes for a new trial, in their motion therefor addressed to the trial court, their assignment here as errors would present no question for the decision of this court; and if they were, as they seem to have been, assigned as causes for a new trial, in such motion therefor, then the only proper assignment of error here was the decision of the court in overruling such motion. The ninth alleged error, namely, the overruling of the motion for a new trial, is properly assigned; and this error brings before this court any question fairly presented to the circuit court by any of the causes assigned for such new trial, in the motion therefor.

We are of the opinion that the evidence in the record fairly tended to sustain the verdict of the jury on every material point. It showed very clearly, as it seems to us, that the firm of Todd & Wright had been engaged in business, at the town of Lagro, for several years prior to the transaction between them and the appellee, which constituted the basis of this suit, one branch of their co-partnership business being the shipment of live fat hogs to a market, and that the appellant George W. Wright was the active member of the firm in the transaction of this branch of their joint business. The evidence further showed that the agreement between the said George W. Wright and the appellee, in relation to the shipment of the latter's hogs by Todd & Wright,

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was fairly within the scope of the business of said firm. On behalf of the appellants it is claimed, however, that the shipment of hogs belonging to other parties, for reward or pay, was not a part of the co-partnership business, but that the firm limited this branch of their business to the shipment of hogs purchased and owned by the firm. But it is not claimed or pretended that the appellee had any notice or knowledge of this limitation in the business of the firm. It was fairly shown by the evidence in the record, that the other members of the firm of Todd & Wright were fully cognizant of the terms of the agreement between said George W. Wright and the appellee, in regard to the shipment of the latter's hogs, at and before the time such agreement was made, and at and before the time of the delivery of appellee's hogs thereunder to the firm of Todd & Wright.

The appellants' counsel insist that the trial court erred in its refusal to give the jury the second instruction, asked by the appellants, in substance, as follows:

"2. In determining what comes within the scope of the partnership business, when there is a doubt about it, the rule which determines it rests upon the necessity of the case. If there was no express agreement amongst the members of the firm of Todd & Wright to ship hogs on commission or for hire, Wright would not be authorized to bind the partnership in a contract of that kind, unless it is shown that there was an absolute necessity for such a contract of shipment."

The court did not err in refusing to give the jury this instruction. It was not the law, and certainly not as applicable to the case at bar. Whether or not the appellee's agreement with said George W. Wright, of the firm of Todd & Wright, for the shipment of his hogs by said firm to a market, was within the scope of the partnership business, was a question, which did not depend in any manner for its proper solution, "upon the necessity of the case," and certainly the appellee was not required to show "an absolute necessity for such a contract," in order to bind the firm to

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the performance of the contract. The agreement in suit was in relation to a matter fairly within the general scope of the partnership business of the firm, as the same appeared to be conducted by them, and was made by the appellee with that member of the firm who seemed to be in charge of that branch of their co-partnership business. It seems to us, that such an agreement so made must be held to be binding on the firm of Todd & Wright, in the absence of any evidence tending to show that the appellee had notice or knowledge that the contract was not, as it appeared to be, within the scope of the business of said firm.

The appellants' counsel also claim that the court erred in refusing to give the jury the fifth and sixth instructions asked by the appellants. We have carefully examined these instructions, and have reached the conclusion that no error was committed by the court in its refusal to give them, or either of them, to the jury trying the cause ; for these two instructions were each of them wholly inapplicable to the case made by the pleadings and evidence ; and, therefore, we think that we need not set out or comment upon these instructions in this opinion. The case seems to us to have been fairly tried and correctly decided in the court below, and indeed the appellants' counsel have made no complaint, in argument, of any of the instructions given the jury by the circuit court. As was said by this court in this case, when it was here before, we again say, that, by forming a co-partnership with said George W. Wright, the other members of the firm of Todd & Wright declared to the world that they were satisfied with his good faith and integrity, and impliedly undertook to be responsible for what he should do, within the general scope of the business of said co-partnership. It can not be doubted that the appellee was induced by and through the said co-partnership, to make the said agreement for the shipment of his hogs. Nor can it be doubted that, when the appellee's hogs had been sold on account of the firm of Todd & Wright, the proceeds of such sale were paid

Lane *et al.* v. Sparks.

over to said George W. Wright, not as an individual, but solely as a member of said firm. To such a case, it seems to us, the doctrine is clearly applicable that, where one of two innocent persons must suffer by the act of a third person, he shall suffer who has been the cause or occasion of the confidence and credit reposed in such third person. Story Partnership, sec. 104, *et seq.*; *Jackson v. Todd, supra.*

The court committed no error, we think, in overruling the appellants' motion for a new trial.

The judgment is affirmed, at the appellants' costs.

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167 533

No. 7542.

LANE ET AL. v. SPARKS.

PLEADING.—Answer.—Replevin.—Fraudulent Transfer of Personal Property.—Execution.—Fraud.—In an action for the recovery of personal property, a paragraph of answer averred that the property was fraudulently transferred to the plaintiff, for the purpose of defeating the collection of a judgment against the former owners thereof, and that the defendants have possession of the property by virtue of a writ of execution issued on such judgment.

Held, that the real defence presented by the answer is property in a third person, and, as evidence thereof was admissible under the general denial pleaded, no error was committed in striking out the answer.

Held, also, that the plaintiff could only recover upon the strength of his own title, and, if that grew out of fraud and collusion between him and his vendors, his action must fail.

From the Clinton Circuit Court.

J. N. Sims, S. Vanton and ——Collins, for appellants.

L. McClurg, J. V. Kent, E. Sparks and J. G. Webster,
for appellee.

ELLIOTT, J.—This is an action for the recovery of personal property, and was instituted by the appellee against the appellants.

Lane et al. v. Sparks.

The answer first filed by the appellants contained two paragraphs, the first of which was the general denial, and the second was an affirmative answer of new matter. The court struck out the second paragraph of the answer upon appellee's motion, and to this ruling exception was properly taken, and duly preserved by a bill of exceptions.

The paragraph of the answer under examination alleged that the property in controversy was owned by Elijah Sparks and Samuel Frazee, on the 16th day of October, 1876, and had been owned by them long prior thereto ; that, prior to the date aforesaid, Sparks and Frazee had executed a note to Hibben & Co., on which Jesse Lane became surety ; that on the said day Hibben & Co. obtained judgment thereon against Sparks and Frazee ; that immediately after the rendition of said judgment, and before the issuing of an execution, Frazee and Sparks, fraudulently conspiring with appellee, transferred to him the property in controversy, for the purpose of defrauding the creditors of said Frazee and Sparks ; that Lane, the surety, paid the principal and interest of the said judgment, and thereafter caused an execution to be issued and the property to be seized ; and that the appellants have possession of said property under and by virtue of said execution. The allegations of fraud are full, and the facts are sufficiently pleaded, and there can be no fault found with the answer, of which we have given only a bare outline, upon that score.

It is argued, with much earnestness and force, that fraud is a defence which must be affirmatively pleaded. This is unquestionably the general rule. Fraud in this case, however, is important only as showing property in a third person, the execution debtors. If the transfer to Allen Sparks was in good faith, then he could maintain the action, but if it was the result of a fraudulent conspiracy to cheat the creditors of the vendors, then the action could not be maintained, for, so far as the creditors were concerned, the prop-

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erty remained in the fraudulent vendors. The appellee could only recover upon the strength of his own title, and, if that grew out of a fraudulent collusion between him and his vendors, his action must fail. The real defence which the answer presents is property in third persons, and this defence was clearly admissible under the general denial. This is so even though the seizure of personal property be alleged to have been justified by a writ of execution. As evidence of the defence set forth in the second paragraph of the answer was admissible under the general denial, no error was committed in sustaining the motion to strike out. That such a defence as that set forth in the answer under mention is included in the general denial, is well settled. *Wiler v. Manley*, 51 Ind. 169; *Davis v. Warfield*, 38 Ind. 461; *Landers v. George*, 40 Ind. 160; *Riddle v. Parke*, 12 Ind. 89; *Kennedy v. Shaw*, 38 Ind. 474.

We are asked to reverse upon the evidence. This we can not do. It is true that there is much conflict, and that upon some material points the evidence is not altogether satisfactory, but there is nothing to warrant an interference by us with the result reached upon the trial.

Judgment affirmed.

75	280
124	184
75	280
144	607
146	594
75	280
165	164

NO. 8064.

WILLIAMS v. OSBON.

PLEADING.—Complaint.—Promissory Note.—Reference to Copy of Endorsement Sued on.—Demurrer.—In an action by the holder of a promissory note against one as endorser, a complaint containing no reference to the copy of the endorsement filed, is insufficient on demurrer. Without such reference, the court could not know that it was a copy of the endorsement sued upon.

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PRACTICE.—*Special Finding.—Burden of Proof.—Endorsement.*—On trial of an action against one as endorser, the burden of proof is on the plaintiff suing as endorsee, and, if the evidence fails to establish the fact of endorsement, the finding should be against him. Unless it was found for him, it will be regarded by the Supreme Court as found against him.

SAME.—“Assigned.”—“Endorsed.”—In such case, a finding “that, prior to the maturity of said notes, said” defendant “assigned said notes, in writing, to the defendant” N., is not a finding that he “endorsed” the notes to him.

SAME.—An averment that a note was “assigned in writing” is not equivalent to an averment that it was “endorsed;” and a finding that it was “assigned in writing” is not a finding that it was “endorsed.”

SAME.—*Meaning of “Endorsement.”*—Endorsement implies a transfer by a writing upon the instrument. “Assigned” implies that the assignment was made upon a separate instrument.

SAME.—“Assignment” Negatives “Endorsement.”—A finding that notes were assigned negatives an endorsement, and the assignment creates no liability, for by it the assignor does not warrant the solvency of the maker.

PROMISSORY NOTE.—*Insolvency of Maker.—Resident Householder.—Exemption.—Execution.—Endorser.—Endorsee.*—An endorsee is not bound to first sue the maker of a promissory note unless the latter has property out of which he can enforce payment of some part of the debt, and if the maker is a resident householder when the note matures, and has not then, or afterward, more than the three (or six) hundred dollars’ worth of property exempt from execution, he is insolvent within the meaning of the law.

SAME.—As between the endorsee and the endorser, the property of the maker, not exceeding the amount exempt by law, must be regarded as beyond the reach of an execution.

From the Greene Circuit Court.

J. D. Alexander and H. W. Letsinger, for appellant.

A. G. Cavins, E. H. C. Cavins, B. F. East and R. T. Thompson, for appellee.

BEST, C.—The appellee brought this suit against the appellant and one Joseph Neldon. In his complaint he alleged that one James Cates, on the 16th of November, 1875, made his note to the appellant for \$108.00, payable the 1st of March, 1878; that appellant endorsed the note to Neldon, and Neldon transferred it by delivery to the appellee; that

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the note was due and unpaid, and at its maturity Cates was and ever since has been insolvent. It was not alleged that a copy of the endorsement was filed with the complaint, though the copy of an endorsement was in fact filed.

A demurrer to the complaint for want of sufficient facts was overruled, and the appellant excepted. An answer in denial, with other special pleas, was filed, and the issues thus formed were submitted to the court, with the request by appellant that the court find the facts specially, and state its conclusions of law thereon.

The court found, in substance, that the appellant, on the 20th of November, 1875, sold to James Cates several parcels of land, for which Cates executed to him two notes of \$108.00 each, payable on the 1st day of March, 1877 and 1878, respectively, with interest at ten per cent., and secured them by mortgage upon the land ; that, prior to the maturity of the notes, the appellant "assigned said notes, in writing," to Joseph Neldon, who, at the October term, 1877, of the Greene Circuit Court recovered a judgment of foreclosure against said Cates upon the notes and mortgage ; that on the 22d of November, 1877, said Neldon assigned the judgment and transferred by delivery the note maturing the 1st of March, 1878, to the appellee, who, upon an order of sale, purchased the land for the amount of costs and the principal and interest due upon the note first maturing ; that on the 1st of March, 1878, James Cates was and ever since has been a resident householder of this State, and at that time he did not have, nor has he since had, more than \$300.00 worth of property. It was further found that the note last maturing was the note mentioned in this action.

The court, upon these facts, concluded that a sufficient excuse was shown for a want of diligence in not pursuing the maker to insolvency, and that the appellee was entitled to maintain the action. To this conclusion the appellant excepted. Final judgment was rendered for the appellee. The

Williams *v.* Osbon.

appellant appeals, and insists that the court erred in overruling the demurrer to the complaint, and in its conclusions of law upon the facts found.

The demurrer should have been sustained. There was no reference in the complaint to the copy of the endorsement filed, and without it the court could not know that it was a copy of the endorsement sued upon. *Stafford v. Davidson*, 47 Ind. 319.

The appellant was sued as an endorser, and unless it appeared that he had endorsed the note mentioned in the complaint, he was not liable for the failure of the maker to pay it. This question was involved in the issue, and the burden was upon the appellee. If the evidence failed to establish such fact, it should have been found against the appellee; and, unless it was found for him, it will be regarded as found against him. *Graham v. The State, ex rel.*, 66 Ind. 386; *Ex Parte Walls*, 73 Ind. 95.

The "finding is," that, prior to the maturity of said notes, "said Williams assigned said notes, in writing, to the defendant Joseph Neldon." This is not a finding that he "endorsed" the notes. It was held in *Keller v. Williams*, 49 Ind. 504, that an averment in the complaint, that the note was "assigned in writing" was not equivalent to an averment that it was endorsed; and we think a finding that the appellant "assigned the notes in writing" is not a finding that he "endorsed" them. The words are not synonymous. The word "endorsement" has a known legal signification, and implies a transfer by a writing upon the instrument. *Cooper v. Drouillard*, 5 Blackf. 152; *Kern v. Hazlerigg*, 11 Ind. 443. The word "assigned" has no such signification, but implies that the assignment was made upon a separate instrument. In *Keller v. Williams, supra*, WORDEN, J., says: "The averment is, that the note was assigned in writing. It may have been assigned in some separate instrument, and not upon the note; and the infer-

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ence is that the assignment was in a separate instrument, as, had it been upon the note, the term endorsed would have been more appropriately used."

The finding that the notes were assigned negatives an endorsement, and the assignment itself creates no liability, for, by such assignment, the assignor does not warrant the solvency of the maker. *French v. Turner*, 15 Ind. 59.

The next question is, do the facts found show the insolvency of the maker so as to excuse the appellee for not bringing suit against him? The maker was a resident householder, and did not have when the note matured, nor has he had since, more than \$300 worth of property. Was he insolvent within the meaning of the law, which requires the property of the maker to be exhausted before the endorser can be made liable? The constitution of the State declares that the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted. Section 1 of "an act to exempt property from sale in certain cases," approved February 17th, 1852, provides, "That an amount of property not exceeding in value \$300, owned by any resident householder, shall not be liable to sale on execution, * for any debt growing out of, or founded upon a contract, express or implied, after the fourth of July 1852." The act of March 5th, 1859, provides that before any person shall be entitled to the benefit of the act of February 17th, 1852, he shall make out, and deliver to the officer holding the writ, a verified inventory of all his property, within or without the State, and unless this is done the officer shall not set apart any property as exempt from execution. The appellant insists that, since no property is exempt from execution until an inventory is furnished, the maker of a note, who owns property liable to be sold upon an execution, can not be regarded as insolvent, though he is a resident house-

Williams v. Osbon.

holder, and his property is worth less than \$300. It is true that, as against an execution, no property is exempt until an inventory is furnished ; but it does not follow, as against an endorsee, that such property must be regarded as subject to execution. He is not required to sue the maker unless the latter has property, out of which he can enforce the payment of some part of his claim. This he can not do, if the property can be exempted from the execution, and we therefore think, as between the endorsee and the endorser, the property of the maker, not exceeding the amount exempt by law, must be regarded as beyond the reach of an execution.

Again, while the 1st section of the act of February 17th, 1852, provides that an amount of property not exceeding in value three hundred dollars, owned by a resident householder, shall not be liable to sale on execution, yet other sections of the same statute made it the duty of the execution debtor to claim the property as exempt from execution. A failure to make the claim was deemed a waiver, and the property was liable to be sold upon an execution. *The State, ex rel., v. Melogue*, 9 Ind. 196 ; *Eltzroth v. Webster*, 15 Ind. 21.

The execution debtor was not required to make a schedule of his property, but he was required to claim it as exempt ; and, under the provisions of that act, it has been held that, as between endorsee and endorser, such property must be regarded as beyond the reach of an execution. *Bozell v. Hauser*, 9 Ind. 522 ; *Campbell v. Gould*, 17 Ind. 133.

The act of March 5th, 1859, does not change this rule. Both before and since that act, the property must be claimed as exempt. Since, the claim must be by a verified inventory, but the mode of making it can not impair the right of the debtor to his exemption, and since the sale of such property can not be enforced, it must, in a suit of this kind, be regarded as beyond the reach of an execution. No other question is presented that will likely arise upon another trial.

We think the court erred in overruling the demurrer to

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the complaint, and in its conclusions of law upon the facts found ; and for these errors the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed, at the costs of the appellee, with instructions to sustain the demurrer to the complaint, with leave to amend, etc.

No. 8134.

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75	286
145	527
75	286
159	592

PROMISSORY NOTE.—Pleading.—Cross Complaint.—Sureties.—Partners Retiring.—Partners Remaining.—Several Demurrsers.—In an action upon a promissory note of a partnership, composed of six persons, against the members thereof and their successors and representatives, but asking judgment against the members alone, a cross complaint of two defendants, alleging that when they withdrew their co-partners assumed and agreed to pay the debts of the firm, including the note sued on, is sufficient to show that the partners remaining became primarily liable, and that, as between them and the retiring partners, the latter must be regarded as the sureties of the former; but the remaining partners, by sale, by death, by assignment and otherwise, being represented in the action by successors, administrators, trustees and receivers, the cause of action on the note was not against the latter, and their several demurrsers to the cross complaint of the retiring partners against them were correctly sustained.

SAME.—Release of Surety.—Extending Time for Payment.—Usurious Interest.—Verbal Agreement.—Evidence.—Where, on trial of such action, the note in evidence showed an agreement to pay ten per cent. interest, not in advance, evidence, that when two partners retired the continuing partners agreed to pay the note, that the payee had notice of that arrangement, that interest was paid for a time at twelve per cent., that by an agreement, not in writing, it was paid at ten per cent. for two years, and interest on interest was paid at that rate, a valid agreement to extend the time of payment so as to discharge the sureties was not proved.

SAME.—Verbal Agreement.—A verbal agreement to pay ten per cent. interest in advance upon a note bearing interest at ten per cent. not in

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advance is usurious, and would not have the effect to extend the time for the payment of the note. The holder may maintain an action upon it the day after making the contract.

SAME.—*Evidence.*—*Promise of Surety with Knowledge of Release.*—Evidence of a promise of the surety to pay the note, made with knowledge of all the facts, is admissible; and, though he had been released by an extension of the time for payment of the note, his promise would be binding upon him.

SAME.—*Damages.*—*Attorney's Fees.*—*Evidence.*—Evidence: “I am an attorney at law; on \$3,300 I think reasonable attorney fees would be \$150,” admitted without objection, is proof sufficient to justify a finding of the court for \$108.10 as attorney’s fees.

PLEADING.—*Cause of Action.*—*Complaint.*—*Cross Complaint.*—The cause of action set forth in a cross complaint must arise upon, or grow out of, the cause of action stated in the original complaint, and not be independent thereof.

From the Wayne Circuit Court.

C. H. Burchenal, for appellants.

W. A. Peelle, D. W. Comstock and H. C. Fox, for appellee.

MORRIS, C.—The appellee sued the appellants upon a promissory note for three thousand dollars, dated May 20th, 1873, due at one day, with interest at ten per cent. after maturity, and attorney fees if suit should be instituted upon the note. The complaint alleged that, at the time the note was executed, the appellants Caleb J. Morris, Richard White, James Williams, John Wallace, Joel Pennington and George W. Callaway, were partners, doing business under the co-partnership name of “Milton Woollen Mill Company,” and that they executed the note in their firm name, a copy of which is filed with the complaint. It is further stated that, after the execution of the note, the appellant Charles A. Hill and one Henry Izor, as the plaintiff was informed, became members of said co-partnership; that afterward, on the — day of —, 1878, the said Izor died intestate, being a partner up to and at the time of his death, and that the appellant Caleb J. Morris and one Aaron Morris were duly

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appointed administrators of his estate ; that afterward the said Isaac Kinsey and Aaron Morris were, in 1878, by an order of the Wayne Circuit Court, appointed receivers of all the property and effects of the said Milton Woollen Mill Company, who accepted said trust, and entered upon the discharge of their duties, and are still acting as such receivers ; that, on the 15th day of November, 1878, Richard White, one of said partners, made an assignment, under the laws of the State, of all his property to the said Kinsey and Aaron Morris, and that, on the 25th of the same month, Caleb J. Morris, another of said partners, assigned his property to the assignees of White, both assignments being made for the benefit of creditors. He prays judgment against Caleb J. Morris, Richard White, James Williams, John Wallace, Joel Pennington and George W. Callaway.

The defendants below, Williams and Wallace, demurred to the complaint. The demurrer was overruled, and they then filed their answer in seven paragraphs. The first was a general denial ; the others were special, upon which issues were formed.

Williams and Wallace also filed a cross complaint against all their co-defendants below. The appellant Hill demurred to the cross complaint, on the grounds : 1st, that a demurrer to the appellee's complaint had been sustained in his favor, and judgment rendered for him against the appellee. 2d, because the cross complaint did not state a cause of action against him. 3d, because there was a defect of parties defendants. Kinsey and Aaron Morris also demurred to the cross complaint, both as receivers of the Milton Woollen Mill Company, and as the assignees of White and Caleb J. Morris. And Caleb J. Morris and Aaron Morris, as administrators of Henry Izor, also demurred to the cross complaint. All these demurrs were sustained, and Williams and Wallace excepted.

The cause was submitted to the court for trial. The court

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found in favor of the appellee, but also found that the appellants Williams and Wallace were the sureties of Joel Pennington, Caleb J. Morris, Richard White, and George W. Callaway.

Williams and Wallace moved the court for a new trial, on the ground that the finding was contrary to law and the evidence, and because the court erred in admitting certain testimony over their objection, and because the damages were excessive. The court overruled the motion. Judgment was rendered in favor of the appellee, but it provided that the same should be first levied of the property of Pennington, White, Morris and Callaway, subject to execution. Williams and Wallace appealed to this court, serving notice of the appeal upon their co-defendants.

The rulings of the court upon the demurrers to the cross complaint, and the overruling of the motion for a new trial, are assigned as errors. We will first consider the questions arising upon the demurrers to the cross complaint of Williams and Wallace.

The cross complaint admits the co-partnership and the making of the note, as stated in the appellee's complaint. It states that shortly thereafter, in 1873, the cross complainants sold their interest in said co-partnership to their co-partners, who, as a part of the consideration for the sale, assumed and agreed to pay all the debts and liabilities of the firm, including the note in suit; that Morris, White, Pennington and Callaway formed a new company, adopting the name of the old firm, and continued the business; that the appellee had notice of all this; that afterward, on the —— of ——, 1874, the said Joel Pennington sold his interest in the assets of said firm to the said Charles A. Hill, who, in consideration thereof, agreed and promised to pay and become liable for all the debts of said firm, including said note; that he became a member of said firm, which was continued under the name aforesaid; that afterward, in

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1876, the said Callaway sold his interest in said firm to one Henry Izor, who became a member of said firm, and, in consideration of said sale, assumed and agreed to pay the debts of said firm, including said note; that Izor died intestate in 1878, and that Caleb J. and Aaron Morris were duly appointed his administrators; that, in 1879, the firm being insolvent, certain proceedings were instituted in the Wayne Circuit Court, which resulted in the appointment of Kinsey and Aaron Morris as receivers of all the assets of said firm; that they accepted the appointment, and were then in the discharge of their duties as such receivers. It is also stated that White and Caleb J. Morris, who had been members of all of said firms, made assignment of all their property, under the statute of the State, to said Kinsey and Morris, the receivers of the firm, for the benefit of their creditors. It is also stated that the firm was insolvent.

The prayer of the cross complaint is, that the relations, rights and equities of the several parties to the cross complaint, growing out of said transactions, be determined by the court; that it be adjudged that Williams and Wallace stand as sureties to all the other defendants, and the interests represented by them as to the note in suit; that, if judgment be rendered in favor of the appellee, the court shall order that the property of Hill and Pennington be first subjected to its payment, and that the means in the hands of the administrators of Izor, and in the hands of the receivers of the Milton Woollen Mill Co., and in the hands of the assignees of White and Caleb J. Morris, be ascertained and applied in payment of any recovery on said note, in such way as may be just and equitable.

We think that, when Williams and Wallace withdrew from said firm, the continuing partners, by assuming and agreeing to pay its debts, as stated in the cross complaint, became primarily liable for the note in suit, and that, as between them and Williams and Wallace, the latter must be regarded

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as the sureties of the former. In the case of *Colgrove v. Tallman*, 67 N. Y. 95, this precise question was decided.

The court says: "By the dissolution of the co-partnership, of which Barnes and Tallman were the members, and the transfer of all the property to Barnes, and his agreement with Tallman to pay all the debts of the firm; Tallman became in equity, as between himself and Barnes, a surety, for Barnes as principal debtor in those debts." The court further says: "When it was made known to Colgrove by Tallman, that Barnes and Tallman had gone into the bargain, which was thus made between them, Colgrove became bound to Tallman in equity to observe it."

Brandt, in his work on suretyship, etc., says: "When one member of a partnership retires from the firm, and the remaining members agree with him to pay the firm debts, and these facts are known to the creditor, the member so retiring will be considered, in law, a surety." Sec. 23. *Oakeley v. Pasheller*, 10 Bligh N. S. 548; *Smith v. Shelden*, 35 Mich. 42.

It is alleged in the cross complaint, that Charles A. Hill purchased the interest of Pennington in said firm, became a member of the firm, and, in consideration of the transfer of Pennington's interest to him, agreed to pay the debts of the firm, including the note in suit. Hill succeeded to the rights of Pennington, which included the interests transferred to him as a member of said firm by Williams and Wallace. By this arrangement, Hill and his partners became bound to Pennington to pay the debts of said firm within a reasonable time, and, for a failure to do so, Pennington could maintain an action against them. But a recovery for such failure by Pennington would operate in favor of the creditors of the firm, and he, as to such recovery, would be held to be their trustee. So, too, by the agreement of the continuing members of the firm with Williams and Wallace, the former were bound to pay the note in suit, and, for a failure to do so, the latter might maintain an action against them.

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By such failure to perform their agreement with Williams and Wallace, the latter became, in a certain sense, the creditors of the firm; and, being such creditors, they could maintain an action upon the undertaking of Hill and his partners, made for the benefit of the creditors of the firm. It is upon this view of the rights of the parties that the cross complaint must be sustained, if at all.

But the contracts of Hill and Izor, on which the cross complaint rests, are independent of, do not arise upon, or grow out of the cause of action stated in the appellee's complaint. The undertaking of Hill and of Izor originated long after and independent of the execution of the note in suit. They had the same relation to, and were not otherwise connected with the note sued on, than would have been any other person, who had agreed, upon a sufficient consideration, to pay said note. It would hardly be pretended that if a person, not a partner in said firm, had promised the appellants Williams and Wallace, to pay said note, they could, when sued by the payee, bring such person into the suit by cross complaint, and, in such action, litigate the question as to whether such person had assumed and agreed to pay said note. In this case Boyd, the appellee, states no cause of action against Hill or the receivers or the assignees of White and Morris, nor against the administrators of Izor; nor does he ask or take judgment against them. We are, therefore, of opinion, that the facts stated do not constitute a valid cause of action by way of cross complaint against Hill nor against any of the defendants thereto, and that, therefore, the court below did not err in sustaining the several demurrers to it.

The appellants insist that the court erred in overruling their motion for a new trial:

- 1st. Because the finding is contrary to law;
- 2d. Because the finding is contrary to the evidence;
- 3d. For errors of law occurring at the trial;

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4th. Because the damages are excessive.

It is insisted that Williams and Wallace, being the sureties of White, Morris, Pennington and Callaway on the note in suit, from the time they sold to them their interests in the firm, upon the agreement that these continuing partners should pay its debts, were released as such sureties by an agreement between the latter and the appellee, extending the time for the payment of the note. The evidence shows that, in 1873, soon after the execution of the note, Williams and Wallace retired from the firm, and that the continuing members White, Morris, Pennington and Callaway, assumed and agreed to pay its debts, and that the appellee had notice of this arrangement. The evidence further shows that, from the time Williams and Wallace retired, the new firm paid the appellee twelve per cent. interest per annum on said note until 1875, when the parties met and made a new verbal arrangement in regard to the interest. Callaway testified, and his testimony is in substantial agreement with that of the appellee, as follows: "In 1875, I told Boyd, the appellee, that twelve per cent. was too much, and that if he did not reduce the interest we would have to try and pay off the note; he said twelve per cent. was a little high, and that he would make the interest the same as bank interest—ten per cent. in advance, and if we did not want to pay the interest in advance, we could keep the interest and pay him interest on that interest; I told him then we would keep it in that way; interest was to be paid annually." At the expiration of a year from this time, the interest not having been paid, Boyd told the company they could keep the interest and pay interest upon it. At the expiration of the second year, the company, pursuant to this agreement, paid Boyd the interest upon the two years' interest due, making it the same as if it had been paid in advance.

Was this agreement valid and binding upon the parties to it? and did it have the effect to extend the time for the pay-

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ment of the note? If it did, Williams and Wallace were released. If it did not, they remained liable on the note.

The interest stipulated for in the note is ten per cent. per annum, not payable in advance. If the verbal agreement did not increase the rate of interest, it could have no effect upon the note. It is obvious, however, that an agreement to pay ten per cent. interest per annum, not in advance, and an agreement to pay the same rate of interest per annum, in advance, are different and distinct agreements. The agreement proven was, therefore, different, as to interest, from that contained in the note.

The parties, by the law then in force, might lawfully contract in writing for ten per cent. interest per annum, payable at the end of the year, or when the principal should become due, or in advance. But such contract, if not in writing, would be usurious and void as to the excess over and above six per cent. Verbally, parties can not lawfully contract for a higher rate of interest than six per cent. per annum.

It is said by counsel for the appellants that Boyd's agreement was to extend the time of payment, in consideration that the makers would pay him interest on the interest stipulated for in the note, and that this was valid. The statement of counsel is equivalent to saying that Boyd agreed to extend the time, in consideration that the makers would pay him for forbearance, in addition to the ten per cent. mentioned in the note, a sum equal to ten per cent, on three hundred dollars, that being the annual interest, at ten per cent., on the note. Such an agreement, to be valid, must be in writing.

We think, therefore, that the verbal contract to pay ten per cent. interest per annum in advance was usurious, and that it did not have the effect to extend the time for the payment of said note. Boyd might have maintained a suit upon it the day after the making of the contract. *Brown v. Harness*, 16 Ind. 248; *Shaw v. Binkard*, 10 Ind. 227.

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The court permitted the appellee to prove on the trial, over the objection of the appellants, that Williams had stated to the appellee, after the facts were known to him, that he would pay the note in full. It is insisted that, in admitting this evidence, the court erred. We think there was no error in admitting the evidence. It tended to show a promise on the part of Williams to pay the note. Such a promise, made with knowledge of all the facts, though he had been released by an extension of the time for payment of the note, would be binding upon him. *Brandt Suretyship, etc.*, sec. 300; *Smith v. Winter*, 4 M. & W. 454; *Porter v. Hodenpuyl*, 9 Mich. 11; *Mayhew v. Crickett*, 2 Swanst. 193.

It is objected that the damages are excessive ; that too much —\$108.10—was allowed as attorney fees. A Mr. Stubbs, without objection, testified as follows: “I am an attorney at law ; on \$3,300 I think reasonable attorney fees would be \$150.” We think this proof justified the finding of the court. The court did not err in overruling the motion for a new trial. The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants Williams and Wallace.

No. 7940.

MARTIN v. BOLTON, ADM'R.

DECEDENTS' ESTATES.—Fraudulent Mortgage.—Action to Set Aside.—The administrator of a decedent's estate can maintain an action to set aside a mortgage of personal property, and an assignment of a certificate of purchase of real estate, fraudulently obtained from the decedent, where such property is necessary for the payment of the debts of the estate.

Martin v. Bolton, Administrator.

SAME.—Pleading.—Complaint.—Repayment.—Where, in such action, the complaint does not show that any consideration was paid to the defendant for the mortgage or assignment, an averment of repayment is not necessary to the sufficiency of the complaint.

From the Warren Circuit Court.

J. McCabe, for appellant.

J. M. Rabb, for appellee.

FRANKLIN, C.—Appellee, as administrator of the estate of Stephen Lally, sued appellant to set aside a mortgage on personal property, and an assignment of a certificate of purchase of school lands, executed by deceased in his lifetime, alleging in his complaint that the execution of the mortgage and assignment was procured by the fraud of appellant, and done to defraud deceased and his creditors, setting out the facts constituting the fraud, and averring that deceased, at the time of their execution, was of unsound mind; that appellant had taken advantage of the unsoundness of deceased's mind to consummate the fraud aforesaid; that said certificate and mortgage covered all the property deceased owned at the time of his death, except about \$40.00 worth, and that deceased was then indebted in the sum of over \$600; that nothing was paid by appellant in consideration of the execution of the mortgage and assignment of the certificate; that the property mortgaged and assigned was worth over \$1,000.

Appellant demurred to the complaint; demurrer overruled, and an answer in denial filed; trial by jury; verdict for appellee; motion for a new trial overruled; rulings excepted to, and judgment for appellee.

The errors assigned in this court are:

1st. Overruling the demurrer to the complaint;

2d. Overruling the motion for a new trial;

3d. Want of sufficient facts in complaint.

In support of the 1st and 3d assignments we have been referred to the following authorities: *Garner v. Graves*,

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54 Ind. 188; *Love v. Mikals*, 11 Ind. 227. The first one of these cases is not applicable to the case under consideration. The complaint in that case contained no averment of any indebtedness of the estate, for which this court decided that the administrator could not maintain the action. In this case there was an averment of that kind, and the complaint in this case further showed that a sale of this property was necessary for the payment of the debts of the estate. The case referred to in 11 Ind. 227 supports the complaint in this case. We have also been referred, by appellant's counsel, to the following cases: *Musselman v. Cravens*, 47 Ind. 1; *Crouse v. Holman*, 19 Ind. 30; *Devin v. Scott*, 34 Ind. 67. These cases do not affect the sufficiency of this complaint. All they decide is, that contracts made with persons, not adjudged of unsound mind, are only voidable; while contracts made with persons so adjudged are void. The complaint is sufficient without the allegation of unsoundness of mind, and that is only alleged as a means by which appellant was enabled to consummate the fraud. It is insisted that the complaint does not aver a repayment of the consideration, and that it is bad for that reason. It does not show that anything was paid, but rather that nothing was paid, and it was, therefore, not necessary to aver a repayment.

The evidence is not in the record, and no question is presented on the motion for a new trial. We see no error in this record.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, at appellant's costs.

Tolle v. Orth.

No. 7680.

TOLLE v. ORTH.

LANDLORD AND TENANT.—Action for Rent After Expiration of Term of Lease.—Surrender of Premises.—Payment of One Month's Rent.—Where a tenant occupying premises under a lease for five years, the rent being payable at the end of each month, held over, and, on the third day of the month beyond the term, notified the landlord in writing, that he would surrender such premises at the expiration of the month, and paid that month's rent, leaving the keys thereof on a table in the landlord's office, he did not thereby effect a surrender of the premises, and is liable in an action for rent accruing thereafter.

SAME.—Tenancy From Year to Year.—By voluntarily remaining in possession beyond the term of the lease, the tenant gave the landlord the option of treating him as tenant for another year, upon the same terms of payment as had before prevailed, and the acceptance of the money tendered with the keys of the building does not affect the question.

SAME.—Acceptance of Rent.—Where rent is unconditionally due, the landlord may accept the money and reject the keys of the building.

From the Tippecanoe Circuit Court.

J. R. Carnahan, R. P. Davidson and J. C. Davidson,
for appellant.

J. Park, for appellee.

WOODS, J.—Action for the recovery of rent of real estate.
Error is assigned upon the overruling of the motion for a new trial, which is asked for the alleged reason that the verdict is contrary to the law and the evidence.

The evidence shows that the appellee, Godlove S. Orth, leased the premises, a store-room in Lafayette, to Jacob Stahl and Reinhold Fritch, for the period of five years, ending November 1st, 1877, at an annual rent of seven hundred and twenty dollars, which the lessees agreed to pay in equal instalments at the end of each month. The lessees, as partners in trade, manufactured and sold tobacco in the leased premises. In 1873 Fritch died, and in 1874 the appellant bought, whether from Fritch's administrator or from Stahl as surviving partner, does not appear, the interest of Fritch, and went into partnership with Stahl. The new firm continued in the business and in the occupation of the premises,

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paying the rent according to the terms of the lease, of which, however, there had been made no formal or written assignment to the new firm, or of any interest therein to the appellant, until October 8th, 1877, when Stahl died. The appellant continued in possession, claiming to be, and acting as, surviving partner, until November 7th, 1877, when he bought of the administrator his deceased partner's interest, but took no formal assignment of the lease, the time of which had expired on the 1st of that month. On the 3d of the month the appellant caused to be delivered to the appellee a written notice that the appellant would surrender the building to the appellee on the 30th of November, 1877, and thereupon the appellee, within a few days, called upon the appellant, and they had on the subject some conversation, about which their testimony is somewhat inharmonious ; but, according to the testimony of either, there was nothing occurred to affect the legal status of the case. On the 30th of the month the appellant, by an agent, sent to the appellee the rent accrued to that time, at the rate theretofore paid, and also the keys to the premises. The appellee received the rent, but refused to accept the keys. The appellant sent the keys again, and caused them to be left upon a table in the office of the appellee, but presumably without the consent of the appellee. Whether the premises were actually occupied, and by whom, after November 30th, 1877, is left to inference from the facts proven, as already substantially stated. The complaint is to recover for the time from said date until February 24th, 1878. The circuit court gave a finding and judgment for the plaintiff for the sum of one hundred and sixty-eight dollars.

The question discussed by counsel is whether the appellant effected a lawful surrender of the premises on November 30th, 1877. The counsel for the appellee contends that, by remaining in possession after November 1st, 1877, when the term of the lease ended, he became, in the absence of a

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different agreement with the appellee, a tenant from year to year. The counsel for the appellant, on the other hand, have argued, at considerable length, several propositions in reference to the relation of the appellant to the written lease, tending to the conclusion which they maintain, that the appellant never became party or privy to the contract so as to come under any obligation by reason thereof to the appellant. Be this as it may, the fact remains that Stahl & Fritch had possession under the lease, and from and through them the appellant got the possession, the same possession which they had. For three years, in company with Stahl, he occupied, paying in accordance with the stipulations of the lease, and, from October 8th, 1877, the date of Stahl's death, he was sole occupant, holding until November 1st at least by virtue, and only by virtue, of the lease. He was certainly beyond the power of the appellee to treat him as a trespasser, and his own acts show plainly that from the time he joined with Stahl in the business he regarded himself as the equitable, if not the legal, assignee of the lease. He at least had possession under it, and if he took advantage of that possession to hold over, the result must be the same as if he were the lessee named in the instrument. He did hold over for a whole month without procuring the agreement of the appellee that he need hold for that time only. He had held over for three days before giving any notice of his intention to the appellee. The notice given was not in the shape of a proposition which called upon the appellee to accept or reject it, but was simply an announcement of the appellant's purpose to surrender on a day named, not asking consent, but assuming the right, to remain until that day. By the statute, all general tenancies in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year. § R. S. 1876, p. 338, sec. 2; *Burbank v. Dyer*, 54 Ind. 392; *Thiebaud v. The First National Bank, etc.*, 42 Ind. 212;

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Bright v. McOuat, 40 Ind. 521; *Gordon v. George*, 12 Ind. 408. By voluntarily remaining in possession beyond the term of the lease, the appellant gave the appellee the option of treating him as tenant for another year, upon the same terms of payment as had before prevailed, and the acceptance of the money tendered, though tendered together with the keys, at the expiration of the time named in the notice of surrender, does not affect the question. The money offered was unconditionally due, and the appellant had a right, therefore, to accept the money and reject the keys.

Judgment affirmed, with costs.

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No. 8105.

CRANOR ET UX. v. WINTERS, EXECUTOR.

HUSBAND AND WIFE.—Partnership of Wife in Business with Another.—Pleading.—Complaint.—Answer.—Demurrer.—In an action (accruing before 1879), by a married woman and her husband, against the executor of her deceased partner in business, for the value of a life insurance policy assigned to her by the deceased for his board and her attention to their partnership business in his absence, an answer, that plaintiff, at the time the partnership agreement was made, was and ever since had been a married woman, the wife of her co-plaintiff, living with him as his wife, constitutes no defence.

SAME.—Coverture no Defence.—Wife's Earnings.—The earnings of the wife during the marriage belong to her husband, and, in the absence of an averment that he gave them to his wife, or that she was carrying on business with her separate property, he had a right to bring suit therefor, making the wife a co-plaintiff, as the meritorious cause of action. To such an action the coverage of the wife is no defence.

SAME.—Set-Off.—Former Adjudication.—Answer of Discharge and Satisfaction.—Former Credit of Demand.—In such action, an answer of coverage and that the partnership business had been settled, that the wife bought the interest of her partner, the testator giving in part payment a note of her husband and another; and that in a suit on the note the husband pleaded as a set-off the identical services, boarding and claim

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mentioned in the complaint, and was allowed and received a credit therefor on his note, in full discharge and satisfaction of the demand sued on, contains a good defence.

SAME.—*Plea of Payment.*—In such action, an answer that “the claim set up in the plaintiffs’ complaint had been fully paid before the commencement of this suit,” was a good defence.

PLEADING.—*Plea of Payment.*—A plea of payment need not allege the amount paid, nor the date of payment, nor the person to whom the payment was made.

From the Grant Circuit Court.

A. Steele and R. T. St. John, for appellants.

J. M. Haynes, for appellee.

BICKNELL, C. C.—This was an action by the appellants against the appellee, on a contract between the said Alice Cranor and Andrew W. Rush.

The complaint avers that Alice Cranor and Andrew W. Rush agreed to be partners in the millinery business, and that in consideration of Alice attending to the business in the absence of Rush, and furnishing him with board when present, he would assign to her a policy of insurance on his life for seventeen hundred dollars; that he did assign to her the policy of insurance, but afterward, without her knowledge or consent, caused the same to be transferred to certain trustees; that Alice performed her part of the agreement; that Rush made a will and died; that the will contained no provision for the benefit of Alice; that the appellee is the executor of Rush, and has received from the insurance company seventeen hundred dollars, the value of said insurance policy, and has refused to pay the same, or any of it, “to the plaintiff.”

The conclusion of the complaint is: “Wherefore the plaintiff prays judgment for the value of said Life Insurance No. —, in the Railway Employees’ Mutual Benefit Association of the West, or the sum of two thousand dollars, against the estate of said Rush, of which Joseph P. Winters is executor, and for all other proper relief.”

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It appeared upon the complaint that all the facts stated therein occurred before the year 1879. A demurrer to this complaint was overruled, but no question as to that arises here. It will be observed that the complaint makes no averment as to the value of the services rendered and board furnished by Mrs. Cranor; it is a single count upon the contract, asking compensation for the breach, and claiming the value of the policy as the compensation fixed in the contract. There is no paragraph for work and labor or for provisions furnished in the way of board.

The appellee answered in seven paragraphs. The appellants demurred to each of the second, sixth and seventh paragraphs, alleging that none of them contained facts sufficient to constitute a defence. The court overruled all of these demurrers; and, the appellants declining to plead further, final judgment was rendered for the appellee.

The errors assigned are, that the court erred in overruling each of said demurrers. The second paragraph of the answer avers that, at the time said partnership agreement was made, the said Alice Cranor was and ever since has been a married woman, the wife of the said Andrew J. Cranor, living with him as his wife. It is not averred in the complaint that Mrs. Cranor was carrying on the business with her separate property; the averment is that Rush agreed to pay Mrs. Cranor for her services, etc. The earnings of the wife during the marriage belong to her husband; it is not averred that the husband gave the earnings in this case to the wife; he had a right to bring suit therefor, making the wife a co-plaintiff, as the meritorious cause of action; to such an action the coverture of the wife is no defence. The court below erred in overruling the demurrer to the second paragraph of the answer.

The sixth paragraph of the answer alleges the coverture of the said Alice, and avers that the partnership was dissolved and its affairs fully settled; that said Alice bought

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the interest of Rush in said partnership, and in part payment therefor gave him a note payable to him, and made by her husband and another for five hundred dollars; that Rush died possessed of said note, and that appellee, as executor of Rush, brought suit upon it against the makers; that in such suit, the defendant, "Andrew J. Cranor, pleaded as a set-off against said note the services rendered by his wife to the said Andrew W. Rush, deceased, and the boarding furnished said decedent by his said wife, said services and boarding being the same identical services and boarding referred to in the plaintiffs' complaint as having been furnished by said Alice L. Cranor to said Andrew W. Rush, deceased, and the said Andrew J. Cranor pleaded as a defence to said note, the identical claim named and set forth in plaintiffs' complaint herein, and afterward the defendant and said Andrew J. Cranor compromised said suit, and this defendant allowed to said Andrew J. Cranor, as a credit on said note, the sum of \$300 on account of the same identical services rendered by the plaintiff Alice L. Cranor to said Andrew W. Rush in attending to said millinery store, and the same identical boarding furnished by said plaintiff Alice to said decedent, Rush, as set forth in the plaintiffs' complaint, and the same identical claim set forth in the plaintiffs' complaint herein, for which service and boarding the said Andrew J. Cranor, husband of said Alice, demanded payment from this defendant, and that said Andrew J. Cranor, husband of the said Alice, received said credit on his said note in full discharge and satisfaction of his claim for said services and boarding set forth in plaintiffs' complaint, and in full discharge and satisfaction of the claim set forth in plaintiffs' complaint herein."

This paragraph of the answer contains a good defence. If Mrs. Cranor rendered any services or furnished any boarding to Rush, her earnings in those respects, in the absence of any statements to the contrary, belonged to her

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husband, and when he was sued by Rush's executor upon his note, and received in that suit \$300 in full for such earnings, that was a good bar to any subsequent action by him, or by him and his wife, therefor. There was no error in overruling the demurrer to the sixth defence.

The seventh paragraph of the answer avers that "the claim set up in the plaintiffs' complaint has been fully paid before the commencement of this suit." This was a good defence. *Demuth v. Daggy*, 26 Ind. 341.

It was held in *Nill v. Comparet*, 15 Ind. 243, that a plea of payment is bad on demurrer, unless it shows to whom the payment was made, but that decision was not adhered to. A plea of payment need not allege the amount paid, nor the date of payment, nor the person to whom the payment was made. *Demuth v. Daggy, supra*. There was no error in overruling the demurrer to the seventh paragraph of the answer; but the judgment of the court below ought to be reversed for the error of the court in overruling the demurrer to the second paragraph of the answer, and the cause ought to be remanded, with instructions to the court below to sustain the demurrer to the second paragraph of the answer, and for further proceedings.

PER CURIAM.—It is, therefore, ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, and this cause is remanded, with instructions to the court below to sustain the demurrer to the second paragraph of the answer, and for further proceedings.

Rooker v. Wise et al.

No. 7255.

ROOKER v. WISE ET AL.

GUARDIAN AND WARD.—Removal.—Insufficient Cause.—Special Verdict.
—*Evidence.*—Where, on trial of a petition for the removal of a guardian, a clause of the special verdict was that “Said guardian has managed the estate of said wards for their best interests, except he has failed to provide suitable homes, and to attend properly to the school education of said wards,” and judgment was rendered removing the defendant from his trust as guardian, the Supreme Court, being satisfied from the evidence that he had done as well as he could under the circumstances, in the way of furnishing homes for his wards, and in attending properly to their education, reversed the judgment.

From the Hamilton Circuit Court.

D. Moss, J. Stafford and J. S. Losey, for appellant.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellees.

WORDEN, J.—The appellees filed their petition in the court below against the appellant, asking his removal from his trust as guardian of the persons and estates of William D. Rooker, George S. Rooker, Frank B. Rooker and Cora M. Rooker, minor heirs of James I. and Mary Rooker, deceased. The petition stated several grounds on which the removal was asked, not necessary to be recapitulated in this opinion.

Issue, trial by jury, and special verdict.

It is not necessary to set out the special verdict in full, for, except as stated in the ninth clause, no fact is found that justified the defendant’s removal, or that showed that he had not in every respect faithfully discharged the duties of his trust. The ninth clause of the verdict is as follows:

“9th. Said guardian has managed the estate of said wards for their best interests, except he has failed to provide suitable homes, and to attend properly to the school education of said wards.”

Motion for a new trial overruled, and judgment removing the appellant from his trust as such guardian.

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We have examined the evidence upon the points as to the supposed failure of the defendant to provide suitable homes, and to attend properly to the school education of his wards, and are of opinion that it fails to establish any neglect or failure in either of those respects, on the part of the appellant. The evidence on these points is lengthy, running through various parts of the bill of exceptions, and we can not set it out without taking up more space than is warranted ; but it seems to us, from it, that the appellant has done as well as he could, under the circumstances, in the way of furnishing homes for his wards ; and we can not see that he has failed to attend properly to their school education.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

•••

No. 7811.

REND ET AL. v. BOORD ET AL.

75 307
159 856

ACCOUNT.—Purchase by Agent.—Partnership.—Pleading.—Complaint.—

Where, in an action upon an account against a firm, the complaint averred that the goods were sold and delivered to an agent of the firm upon its order, it is immaterial for what purpose or for whose use the goods were intended.

SAME.—Demand.—Where one is indebted for goods sold to his order, no demand of payment is necessary on the part of the creditor.

SAME.—Interest.—Interest may be recovered on an open account, the payment of which has been long withheld.

From the Fountain Circuit Court.

G. Mc Williams and J. Ristine, for appellants.

L. Nebeker and S. M. Cambern, for appellees.

BEST, C.—The appellee Fremont Boord sued the appellants, alleging in his complaint that they were partners, and

Rend et al. v. Boord et al.

as such were indebted to him for goods sold and delivered to one Mehan, their agent, for them and upon their order, by his co-appellee Oliver Boord, who had assigned the account to him, and who was made a defendant to answer as to the assignment. Interest was claimed, and a bill of particulars filed. The bill embraced various items alleged to have been furnished in October and November, 1874, amounting to \$73.95, and \$15.33 interest upon the same for three and a half years. Issues were formed, a trial had, and judgment rendered for \$91.45.

A motion for a new trial, because the damages assessed were excessive, and the finding not sustained by sufficient evidence, was overruled, and an exception taken.

On this appeal the appellants insist that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in overruling the motion for a new trial. Appellants assume that the goods mentioned in the complaint were intended for Mehan's individual use, and insist that they, as partners, are not liable for such goods, unless they ratified Mehan's act in purchasing them. There is nothing in this suggestion. If appellants ordered the goods as averred, it is wholly immaterial for what purpose or for whose use they were intended.

It is further suggested that the complaint is defective because it is not stated when payment was demanded. No demand was necessary. If appellants were indebted as averred, it was their duty to pay without a demand, and if they were not indebted, a demand would create no liability. If a credit had been given, and had not expired, they were not indebted. No other defects have been suggested, and we are unable to discover any.

The motion for a new trial was properly overruled. The evidence tended to support every material averment in the complaint. Indeed, this is not controverted; but it is insisted that the damages assessed are excessive. Nearly all

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the goods were purchased in October, 1874, were to be paid for monthly, and from this time interest was allowed. The amount of interest added was not in excess of the amount due, if any could be recovered. That interest may be recovered on an account, the payment of which has been so long withheld, has already been decided. *Marsteller v. Crapp*, 62 Ind. 359; *Young v. Dickey*, 63 Ind. 31.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the costs of the appellants.

No. 7862.

WARNER ET AL. v. CURRAN.

TAXES.—*Exemption from.*—*Constitutional Law.*—*Answer.*—*Demurrer.*—

75	309
150	240
152	280
75	309
158	551
75	309
160	347

Evidence.—The eighth clause of section 7 of the act of December 21st, 1872, 1 R. S. 1876, p. 73, exempting an amount of property from taxation in certain cases, is unconstitutional and void, and no error is committed in sustaining a demurrer to an answer setting up such exemption, or in excluding evidence offered in support thereof.

PRACTICE.—*New Trial.*—*Excessive Damages.*—*Assessment of Recovery.*—
Supreme Court.—To present for the decision of the Supreme Court any question in relation to excessive damages, or supposed error in the assessment of the amount of recovery in the trial court, such matters must be assigned as reasons for a new trial in the motion therefor.

From the Huntington Circuit Court.

B. W. Cobb and **T. J. Smith**, for appellants.

M. B. Williams, for appellee.

Howk, C. J.—The appellee sued the appellants in a complaint of three paragraphs, but to the first and second para-

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graphs the appellants' demurrers, for the want of facts, were sustained by the court, and the case comes before this court, so far as the complaint is concerned, solely on the third paragraph. In this latter paragraph the appellee alleged, in substance, that, on the 3d day of February, 1868, at a tax sale of lands and lots, for taxes delinquent thereon for the years 1866 and 1867, then held by the auditor of Huntington county, he, the appellee, purchased lots numbered 62 and 68, in the original plat of the town, now city, of Huntington, and then and there paid the said auditor certain specified sums of money for the said lots respectively; that, thereafter, on other specified dates, the appellee paid the county treasurer of said county certain other specified sums as the taxes on each of the said lots, for the succeeding years from 1868 to 1876, inclusive; that all the said sums so paid by appellee were taxes duly levied and assessed on said lots; that no part of the said payments by appellee had been returned to him by the appellants, but the whole remained due and unpaid, together with penalties and interest; and that the said sale for taxes was informal, and the conveyance by the auditor was invalid and insufficient to convey title. Wherefore the appellee prayed judgment for \$2,000, and that the same might be declared a lien on said lots, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee in the sum of \$604.98; and over the appellants' motion for a new trial, and their exception saved, the court rendered judgment on its finding, declaring the sum found due to be a lien on said lots, and ordered the same to be sold to satisfy the judgment, with interest and costs.

The first error complained of by the appellants, in this court, is the decision of the circuit court in overruling their demurrer to the third paragraph of the complaint, for the alleged insufficiency of the facts therein to constitute a cause

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of action. In our statement of this case, we have given a summary of the facts alleged by appellee in the third paragraph of his complaint, and it is apparent therefrom that the appellee intended to state a cause of action therein, under the provisions of section 256 of "An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon," approved December 21st, 1872, 1 R. S. 1876, p. 129. The record shows that the appellants demurred, for the want of facts, to the third paragraph of the complaint, but it fails to show that the court made any ruling on this demurrer, or that any exception was saved to any such ruling. The first supposed error, therefore, is not shown by the record, and the question of the alleged insufficiency of the third paragraph of complaint is not presented for the decision of this court.

The second error assigned by the appellants is the decision of the circuit court, in sustaining a demurrer to the second paragraph of their answer. This paragraph of answer was filed by and in the names of the appellants Sarah, Cornelia E. and Minnie J. Warren, who were infants, under the age of twenty-one years, by their guardian *ad litem*; and it was alleged therein that the said infants were the owners of one-half of the real estate described in appellee's complaint, as the descendants of Luzern Warner, who died January 20th, 1870, seized of said lots in fee; that, up to the time of his death, the said Luzern Warner had an abundance of personal property out of which the taxes thereon and on said lots could have been made, for the years the lots were sold and purchased by appellee, and which purchase forms the basis of his claim; that said Sarah, Cornelia E. and Minnie J. Warner were unmarried females, under the age of twenty-one years, and did not own property exceeding in value the sum of \$500 each; wherefore the said infant appellants averred, that the said taxes so paid by appellee, on their portion of said lots, could and would have been re-

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bated against their said property, and were paid by appellee unnecessarily and without right; wherefore the infant appellants said, that the appellee ought not to recover in this suit, and they demanded judgment for their costs, and that their title to the one-half of said lots might be forever quieted.

It will be readily seen, we think, from the facts alleged in this second paragraph of answer, that it was founded upon the *eighth* clause of section 7 of the above entitled act, wherein it was provided, in substance, as follows:

“Sec. 7. The following property shall be exempt from taxation: * * *

“*Eighth.* The property to the amount of five hundred dollars, of a widow or unmarried female, or of any female minor whose father is deceased, if her whole estate real and personal, not otherwise exempted from taxation, does not exceed in value the sum of one thousand dollars.” 1 R. S. 1876, pp. 73, 74.

If these statutory provisions could be held to be valid and constitutional, it could not be doubted that the facts alleged by the infant appellants, in the second paragraph of their answer, were sufficient to show that their interests in the lots in controversy were exempt from taxation. But in the recent case of *The State, ex rel., v. The City of Indianapolis*, 69 Ind. 375, it was held by this court, and, we think, correctly so, that this eighth clause of section 7 of the assessment law of December 21st, 1872, was unconstitutional and void. It follows, therefore, that the court committed no error in sustaining appellee's demurrer to the second paragraph of the appellants' answer.

Under the alleged error of the trial court, in overruling the appellants' motion for a new trial, it is claimed by their counsel that the court erred in excluding the evidence offered by them to prove that the infant appellants were unmarried females, under the age of twenty-one years, whose

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father was dead, and that the whole estate of each of them, real and personal, did not exceed in value the sum of \$500. These facts were wholly immaterial, and in excluding the evidence offered to establish them, we think the court committed no error.

The only other causes for a new trial, assigned by the appellants in their motion therefor, were, that the finding of the court was contrary to law, and that it was not sustained by sufficient evidence. The appellants' counsel very earnestly insist, in argument, that the damages assessed by the court were excessive, and that the court erred in its assessment of the amount of appellee's recovery. These, however, were statutory causes for a new trial, and should have been assigned as such in their motion therefor, addressed to the circuit court. The appellants did not assign these causes for a new trial in their motion therefor, and, therefore, no question is presented for the decision of this court, in relation to excessive damages, or to the supposed error of the trial court in the assessment of the amount of recovery. *Leary v. Ebert*, 72 Ind. 418. It is settled by the decisions of this court, that the causes for a new trial, assigned by appellants in their motion therefor, will present no question in relation to excessive damages or the amount of recovery, for the decision either of the circuit court or of this court. *Spurrier v. Briggs*, 17 Ind. 529; *Floyd v. Maddux*, 68 Ind. 124; *Hyatt v. Mattingly*, 68 Ind. 271.

The evidence in the record tended strongly, we think, to sustain the finding of the court, on every material point, and we know of no ground on which it can be said that the finding was contrary to law. No error was committed by the court, in our opinion, in overruling the motion for a new trial.

The judgment is affirmed, at the appellants' costs.

Bell v. Davis.

75 314
126 317
—
75 314
146 516

No. 8960.

BELL v. DAVIS.

75 314
171 377

SUPERIOR COURTS.—*Judgments of.*—Statute Construed.—Under section 12 of the act establishing superior courts, 2 R. S. 1876, p. 23, judgments of a superior court have in all essential particulars the same effect as those of the circuit court.

SAME.—*Transcript of Judgment.—Lien.*—The provisions of the act, *supra*, authorize the filing and docketing of transcripts of judgments rendered by a superior court, and upon a compliance with the law in relation thereto such judgments become a lien upon the lands of the judgment debtor situate in the county where the transcripts are filed and docketed.

JUDGMENTS.—*Transcript.—Lien.*—In order that a judgment shall constitute a lien upon real estate in a county other than that where rendered, a transcript thereof must be entered and recorded in the judgment docket of such county.

SAME.—*Real Estate.—Duty of Purchaser.—Diligence.*—If, before the purchase of real estate, the purchaser, having received information that a transcript of a judgment against the owner had been filed, goes to the proper officers, and in good faith causes an examination of the records to be made, and they disclose the fact that there is no judgment lien, he is justified in acting upon the belief that there is none.

From the Morgan Circuit Court.

M. G. McLain and J. P. Baker, for appellant.

G. W. Grubbs and A. C. Harris, for appellee.

ELLIOTT, J.—On the 7th of September, 1876, Bell, the appellant, recovered judgment in the superior court of Marion county, against Alcott & Ainsworth, for \$727.33. Replevin bail was entered, and the execution returned. On the 25th day of the same month, appellant sent a transcript of the judgment, including the entry of replevin bail, by Cornelius B. Howell, to the clerk of the Morgan Circuit Court, with the proper fee. The judgment against the principal debtors, and the entry of replevin bail, were duly entered on the order book, but the clerk did not docket the entry of replevin bail by Howell. At the time the clerk made the entries in the order book, Howell was the owner of the real estate in controversy. On the 1st day of Feb-

Bell v. Davis

ruary, 1877, Howell conveyed the said real estate to Mrs. Ainsworth, the wife of one of the principal debtors, and she conveyed the same property to the appellee on the 8th day of June, 1877. In June of the year following, Bell issued and levied an execution on the said real estate. Sale was made thereon, and the property purchased by Bell. This action was thereupon instituted by appellee to quiet title, and he succeeded in obtaining the judgment sought.

Two of the questions of importance which this record presents, are these:

First. Was there any law in force in September, 1876, authorizing the filing and docketing, in other counties, of transcripts of the judgments of the superior court of Marion county?

Second. If there was such a law then in force, did the filing and entering of a transcript, from said superior court, upon the order book of the county to which it was sent, constitute a lien upon real estate of the judgment debtor in said county, or was it also necessary that such transcript should be properly entered upon the judgment docket?

Of these questions in their order. The appellee affirms that the law in force in September, 1876, did not authorize the filing of transcripts of the Marion Superior Court in other counties. The appellant, upon the other hand, contends that the act organizing the superior court intended that the judgments of that court should become liens to the same extent and under the same conditions as those of the circuit courts of the State. The statute expressly makes transcripts of the judgments of the circuit courts liens upon lands of the judgment debtor in the county where they are properly filed and docketed, secs. 528 and 529 of the code. Section 12 of the act creating the superior court provides: "Said court shall be a court of record and of general jurisdiction, and its judgments, decrees, orders, and proceedings shall have the same force and effect as those of the circuit

Bell *v.* Davis.

court, and shall be enforced in the same manner." We think the evident meaning of this section, even taking it apart from all the other provisions of the statute, is to make the effect of the judgments of the superior court in all essential particulars the same as those of the circuit court. The lien of a judgment of the circuit court may be carried to a different county from that in which the court sits, and unless the lien of the judgment of the superior court may in like manner be so extended, it is stripped of much of the force and effect which the law assigns to the judgment of the circuit court. To give the same force and effect to the judgment of the superior court that the law gives to that of the circuit court, it must be held that the lien of a judgment of the former may, the provisions of the statute applicable to judgments of the latter having been complied with, be conveyed to counties other than that in which the superior court sits. The solution of the question under discussion does not, however, depend upon the meaning to be attached to isolated provisions. The whole statute, together with its objects, the occasion and necessity which led to its enactment, the mischief intended to be remedied, and all like matters are to be considered in determining what construction it shall receive. It is upon this general doctrine that the case of *Hedrick v. Kramer*, 43 Ind. 362, proceeds, and what was there said by WORDEN, J., in delivering the opinion of the court applies with decisive force to the present case. We have no hesitation in holding that the law does authorize the filing and docketing of transcripts of judgments rendered by the superior court, and that upon full compliance with the law such judgments become a lien upon the lands of the judgment debtor situate in the county where the transcripts are filed and docketed.

Second. The second of the questions stated is answered against the appellant by the case of *Berry v. Reed*, 73 Ind. 235. It is there expressly held, that, in order that the judg-

Bell v. Davis.

ment shall constitute a lien, the clerk of the county to which the transcript is transmitted must enter and record it in the judgment docket of the county.

It is suggested, rather than argued, that the appellee had notice before purchase of the filing of the transcript in the clerk's office of Morgan county. It appears from the special finding, that, pending the negotiations for the purchase of said land by Davis, Ainsworth notified Davis that he had been informed that Bell had filed a transcript of the said judgment in Morgan county against said Howell, while he was the owner of said lands ; that thereafter Davis procured an abstract of title, and that the clerk of said county of Morgan certified that the said property was free from all liens or judgments ; that the said Ainsworth, after the abstracts had been procured, said to Davis that he, Ainsworth, must have been mistaken, as it did not appear that such transcript was filed, and thereupon the sale was concluded, and the full consideration paid. Judgment liens are created by statute, and the requirements of the statute giving a lien must be complied with, or none exists. In this case no lien attached until the transcript was filed, entered and docketed as the statute requires. It is, therefore, extremely doubtful whether mere notice of the filing would have even put the purchaser upon inquiry, for a judgment gives no specific lien, creates no interest in property, but merely becomes a general lien when all has been done by the judgment creditor which the law requires. But we need not decide this question, for we think that, conceding that the information received from Ainsworth was such as to put Davis upon inquiry, it is conclusively shown that he did make the proper inquiry, did all that good faith and diligence required that he should do. He went to the officer in charge of the records, caused search to be made, obtained from the officer the proper certificate, and, acting upon the faith of the knowledge thus obtained, bought the property and paid full value for it.

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We think that all that can be justly required of one receiving information that a transcript has been filed, is to go to the proper officer and in good faith cause an examination of the records to be made. If they disclose the fact that there is no judgment lien, he is justified in acting upon the belief that there is none. Officers and records are, in such cases, the proper sources of knowledge, and to these sources notice sufficient to put upon inquiry fairly and reasonably points. The case of a mere general judgment lien, depending for its validity entirely upon the provisions of the statute, is unlike a lien created by contract, as a mortgage, a vendor's lien, or the like. In the one case the lien owes its force and existence to the contract of the parties; in the other the lien owes its entire vitality and force to the provisions of the statute. Entering and docketing transcripts of judgments rendered in a different county are not simply methods of supplying notice, but they are the essential acts which create a lien. A transcript of a judgment lying in the vault of a clerk's office, neither entered nor docketed, is no more a lien on lands in that county than the last week's newspaper received by the clerk.

Judgment affirmed, with costs.

No. 7692.

LEMMON v. WHITMAN ET AL.

PROMISSORY NOTE.—Sureties.—Agreement with Principal.—Extension of Time for Payment.—Demurrer to Evidence of Sureties Defendants.—Valid and Binding Contract.—Discharge.—Where, upon trial of an action upon a promissory note, dated July 5th, 1871, payable in one year, with interest at ten per cent. after maturity until paid, two defendants gave evidence tending to prove a plea that they executed the note as sureties only, which the payee knew, and that the time for payment had been extended by an agreement between the payee and the principal debtor,

Lemmon v. Whitman et al.

without their consent, and the plaintiff's demurrer to defendants' evidence was overruled, the Supreme Court, being satisfied from the evidence that a valid and binding contract for an extension of time had been made, without the consent of the sureties and upon an executed consideration, affirmed the judgment.

SAME.—*Interest at Ten Per Cent. Contracted for.—Interest Paid at Twelve Per Cent in Advance.*—In such case, evidence that the note included interest for one year in advance at ten (or twelve) per cent., that, in July, 1873, interest at ten per cent. for the year then past, and fifty dollars additional for one year's forbearance, was paid. that, in July, 1874, and July, 1875, each, a like payment was made, and forbearance contracted for, all without the consent of the sureties, shows a valid and binding contract for an extension of time, which operated to release the sureties, and sustained their plea.

SAME.—*Recoupment.—Usurious Interest.—Lawful Interest.*—The rule of recoupment is to credit the amount of the payment of usurious interest at the date of payment, thus paying the accumulated lawful interest, or cutting down the principal.

SAME.—*Consideration for Extension.*—The payment of usurious interest, for a time already elapsed, on a note or other obligation to pay money, constitutes a good consideration for an agreement to extend the time of payment, though under the law the debtor or his sureties, if they choose, may recoup the amount so paid.

SAME.—*Taint of Usury.—Borrower may, but Lender may Not, Plead Usury.—Voidable Contract.*—The borrower may set up usury for the purpose of avoiding a contract tainted with it, but the lender can not. Such a contract is not absolutely void, but voidable only on account of the usurious taint, and that not at the option of the lender, but of the debtor.

SAME.—*Rescission and Recoupment.—Restoration by Creditor will not Avoid Contract for Extension.*—The right of rescission and recoupment is personal to the debtor, his heirs, representatives or sureties. The creditor who has received the usury has no right to restore it or credit it on the debt, and thereby release himself from his engagement to give time, especially after the stipulated time has gone by, on the ground that his agreement was without sufficient consideration.

PRACTICE.—*Pleading.—Demurrer to Evidence.—Pleading Definite and Unequivocal.—Proof Indefinite and Equivocal.*—A pleading must be definite and unequivocal, but the proof necessary to support the plea, especially upon a demurrer to the evidence, may be both equivocal and indefinite, and yet be deemed sufficient.

From the Pike Circuit Court.

J. E. McCullough, J. H. Miller and E. P. Richardson,
for appellant.

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A. Iglehart, E. A. Ely and C. H. Burton, for appellees.

Woods, J.—The appellant sued the appellees upon a promissory note. The defendants Adams and Morgan answered, admitting the execution of the note, but averring that they executed the same as sureties only, and that, knowing this fact, the payee had made an agreement with the principal debtor for an extension of time for the payment of the note. The note bears date July 5th, 1871, and is payable to the plaintiff twelve months after date, "with interest at ten per cent. after maturity until paid." Upon a trial by jury, the appellant demurred to the evidence adduced by said defendants. The court overruled the demurrer and gave judgment accordingly. The error assigned upon this ruling is the only one in support of which the counsel for the appellant has cited authority or made any argument.

There can be no doubt, on the evidence set forth in the demurrer, that the appellees were, and were known by the payee of the note to be bound as sureties only, and that they gave no consent to any agreement for an extension of the time of payment to the principal debtor. The only question is, whether the evidence is such as reasonably warrants an inference of a valid and binding contract for an extension of the time of payment. We give so much of the evidence as bears on this point:

George Whitman testified: "I gave this note as principal, and the other defendants, Ferguson, Adams and Morgan, are sureties for me; the interest for twelve months was put in the note; at the time I gave the note to Elijah Lemmon, I received from him two thousand dollars; the balance is interest put in the face of the note; I don't remember that there was any contract with the sureties about the rate of interest, except as stated in the note; there was nothing said in the presence of the sureties about the rate of interest, that I know of; I don't think any of the sureties were present when the money was paid to me,

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or when there were any conversations about the rate of interest ; I agreed to give the note, with \$250 of interest included, and I did give it that way ; there was nothing said, at that time, as to what should be the rate of interest when the note became due ; Mr. Lemmon, the payee, knew, at that time, that I was the principal, and the other makers of the note were sureties ; I don't recollect that anything was said about interest when the note became due ; about July 5th, 1873, I paid Lemmon the first interest ; I paid him twelve per cent. interest, that is, I paid him ten per cent. interest and fifty dollars in addition ; this was all paid as interest for one year ; he said as long as I would pay him ten per cent. interest, and fifty dollars in addition, from year to year, annually, he would wait on me ; I never made a calculation of what it amounted to, but I paid him the ten per cent. and fifty dollars as interest for one year ; after that I paid interest at the same rate up to July, 1875 ; I don't remember whether I paid at the same rate in July, 1875, or not ; I know I paid ten per cent. then, but do not remember whether I paid the fifty dollars extra for that year or not ; it was Mr. Lemmon's own proposition that I should pay fifty dollars extra ; he said that that was what men had to pay at the bank ; I paid the fifty dollars extra to make the interest up to twelve per cent. ; the fifty dollars was not to be credited upon the note ; I never said anything to the sureties about the rate of interest I was paying, and they did not know it, so far as I know ; in 1874, about the 1st to the 5th of July, Mr. Lemmon came after his interest again, and again I paid him \$250 interest, and the \$50 in addition ; it may have been \$225 and the \$50 in addition that I paid him ; I paid him enough, in all, to make it up to twelve per cent. ; he said, at that time, that he did not want the principal at all, as long as I would pay him the twelve per cent. ; he said he would not push me or collect the note

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as long as I paid the interest, at that rate, from year to year ; I paid the interest at that rate in 1873 and 1874 ; I am not certain as to 1875 ; Mr. Lemmon said he would wait on me as long as I would pay the interest at twelve per cent. ; I executed another note to Mr. Lemmon about a month before I executed this note ; I think before ; it may have been about a month after ; in 1874 I executed a mortgage to Mr. Lemmon to secure both these notes ; I think it was in August, 1874 ; I went to see him and told him I would give the mortgage, and told him to come down and select the land he wanted ; I had close to fifteen hundred acres of land in Pike county ; he said he would come down and fix it up and take the mortgage ; there was nothing said at the time about the time of paying the notes ; he came down to Petersburg in a few days after that ; nothing said at that time about extending the time for the payment of the notes ; I gave him a mortgage on 520 acres of land in Pike county, about a mile east of Winslow, worth then about twenty dollars per acre ; it was in sections thirty-three and thirty-four in township one south, range seven west ; I spoke to Ferguson about giving mortgage before I gave it, but not to Morgan or Adams ; Lemmon never spoke to me about having got notice from Ferguson to sue ; the fifty dollars that was paid extra in July, 1874, was not to be accredited on the note ; it went to make up the twelve per cent. interest ; as I stated before, Mr. Lemmon said he would wait just as long as I would pay him the twelve per cent. interest."

Cross-examination : "At the date of the note in suit, twelve per cent. was added in as interest ; the amount I paid in July, 1873, I paid as one year's interest for the then past year, and in July, 1874, the amount I paid Mr. Lemmon again was paid as interest for the then past year ; all that I paid was on past interest ; I did not pay any of it as interest in advance ; the note bore ten per cent. interest after maturity,

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and then to make it up to twelve per cent. for the past year, I paid him the fifty dollars ; he said he would wait on me as long as I paid him the twelve per cent. interest."

The mortgage referred to was put in evidence, but it describes lands in township number two, instead of one as stated by the witness. There is other evidence indicating that the mortgage misdescribed the land in this respect. Besides the note in suit, the mortgage, which bears date August 5th, 1874, purports to secure a second note for \$2,500, bearing date June 15th, 1872.

Directing our attention to the transaction of July 5th, 1873, the jury might, not unreasonably, have said that, as described by the witness, it amounted to this : The creditor said to his debtor, you allowed me twelve per cent. the first year, and put it into the face of the note ; for the year now passed since its maturity, the note calls for only ten per cent., and you never promised to pay me any more ; but do you now pay me the interest due, and fifty dollars in addition, to make it up to twelve per cent. for the past year, and I will let the note run another year, and so long as you pay the extra sum from year to year, the note may run ; the debtor assented, and paid the interest and the extra fifty dollars ; and in 1874 the same transaction, upon the same understanding, was repeated ; and in this instance, possibly the payment was made before the 5th of the month, by from one to four days. Stated more succinctly, the parties each time agreed for another year's extension, in consideration of the payment then made of fifty dollars in excess of the stipulated interest, for the past year, and of the agreement of the debtor to pay a like extra sum upon the interest for the ensuing year, and from year to year thereafter, so long as the debtor should choose to do it.

The fact that the fifty dollars were applied to the interest for the past year does not affect the question. The debtor was under no obligation or promise, written, oral or im-

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plied, to pay more than ten per cent. for the first year after the maturity of the note, and if the parties in July, 1873, made an agreement that the debtor should pay \$50 on the past year's interest, and a like sum on the next year, in excess of the stipulated rate, to be paid at the end of the year, the sum paid down upon the year past would constitute the consideration for the extension as much as the sum to be paid at the end of the time; and more, indeed, for the promise to pay could not be enforced, and therefore was no consideration at all, while the payment made was an executed consideration, and good, unless the fact that it was in excess of ten per centum, the lawful amount for which a valid contract could be made, made it inoperative. This brings us to the question whether the payment of usurious interest, for time already elapsed, on a note or other obligation to pay money, can constitute a good consideration for an agreement to extend the time of payment, when under the law the debtor or his sureties, if they choose, may recoup the amount so paid.

In *Harbert v. Dumont*, 3 Ind. 346, it was held that such an agreement for an extension of time, made under the interest law of 1845, which did not authorize the recovery or recoulement of the interest, was valid, because beneficial to the recipient of the usurious interest. In *Shaw v. Binkard*, 10 Ind. 227, it was held that such an agreement did not discharge the surety, because, under the law then in force, the taking of usurious interest was punishable by fine, and the interest recoverable by the debtor, and the contract for extension therefore not binding. In *Redman v. Deputy*, 26 Ind. 338, followed by *Calvin v. Wiggam*, 27 Ind. 489, interest at the rate of ten per centum in advance, for a stated time, was paid, and the surety was discharged, it being held that the payment of legal interest in advance was a sufficient consideration, and the contract was not invalidated on account of the usurious excess.

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In *Cross v. Wood*, 30 Ind. 378, the decision rests on the ground that the usurious interest paid in advance, under the law as it then was, was not recoverable directly or indirectly. The cases of *Charlton v. Tardy*, 28 Ind. 452, *Hamilton v. Winterrowd*, 43 Ind. 393, *Abel v. Alexander*, 45 Ind. 523, and *White v. Whitney*, 51 Ind. 124, go no further than *Redman v. Deputy*, *supra*, and are to the effect that the payment of interest in advance is a good consideration, though paid at an usurious rate. In *Abel v. Alexander*, *supra*, after a citation of some of the aforesigned cases, it is said that the ruling in these cases was based upon two grounds: 1st. That the payment included legal interest; 2d. That, although the usurious interest might be recovered back in an independent action, or might be recouped in an action upon the note, the use of the usurious interest constituted a sufficient consideration to support an agreement to extend the time of payment. But the well settled rule of recoupment is to credit the amount of the payment of usurious interest at the date of payment, the effect of which, of course, is either to pay the accumulated interest or to cut down the principal of the obligation, and thereby stop *pro tanto* the accruing of further interest; and when such credit has been given, after the maturity of the obligation, it is evident that the creditor has the use only of what is justly his own, and the use of his own can afford no consideration to support an obligation in favor of another. See *Markel's Adm'r v. Spitler's Adm'r*, 28 Ind. 488; *Fensler v. Prather*, 43 Ind. 119. While, therefore, these cases rest on the very solid ground that the payment of interest in advance is a sufficient consideration for the contract, they are not authority for the proposition that the payment of a sum as usurious interest, or of a sum which may be recouped or recovered as usurious because in excess of the lawful contract rate of interest, when not applied, nor intended to be applied, as interest in advance, is a good consideration for such contract.

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The statute under which *Shaw v. Binkard, supra*, was decided, was peculiar, making the receipt of the usurious interest an illegal and penal act, and authorizing the recovery of the sum illegally paid, but without interest and without costs of suit. Recoupment was not provided for. In effect, the case denied the debtor the benefit of his agreement for further time, and permitted him to recover only the actual amount paid out upon it. The case of *Brown v. Harness*, 16 Ind. 248, in so far as it is now pertinent, seems to have had but little consideration. Under what law the payments then set up were made, the opinion does not disclose, and it is not manifest why the payments stated were not treated, as in the later cases, as payments of interest in advance, and therefore operative to extend the time. The case of *Chrisman v. Perrin*, 67 Ind. 586, can hardly be deemed an authority. The third paragraph of answer in that case expressly averred an agreement, made on a day named, to extend the time of payment for one year, and yet it was said to be defective because it did not aver a definite time to which the extension was granted; and then adding, that it did not state such a contract as would bind the payee, concluded correctly enough, that the ruling in reference to the paragraph was harmless, because the same matter was pleaded in the fourth paragraph.

The ruling on the second paragraph of the answer in *Abel v. Alexander, supra*, does not, as counsel claim, cover the question. The consideration for the extension there alleged, as the plea was construed by the court, did not include the payment made and credited, but only "the agreement and promise of Alexander to continue to pay interest on said note at the rate of fifteen per cent." The construction placed upon the plea was too narrow, but the decision, having been expressly based upon a stated construction of the answer, is not authority for a conclusion in reference to a different construction. It may properly be observed in

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reference to the two cases last cited, that the questions in them were questions of pleading; while here it is of inference from the proofs. The averments of a pleading must be definite and unequivocal, but the proof necessary to support the plea, especially upon a demurrer to the evidence, may be both equivocal and indefinite, and yet be deemed sufficient. *Miller v. Porter*, 71 Ind. 521.

From this review of the cases, it may fairly be said that the question under consideration is an open one, in this State, to be decided on reason and principle.

It is well settled that only the debtor and those bearing to him certain relations of privity or of identity of interest, can take advantage of the right to recover or to recoup usurious interest which has been paid. *Studabaker v. Marquardt*, 55 Ind. 341. To hold, therefore, that secret agreements between the principal debtor and the creditor, such as were made in this case, may be made and carried out for years, both parties obtaining what they bargained for, and yet to say that in respect to the sureties the agreements were not valid, because ultimately the debtor may, if he shall choose to do it, claim a credit for the usurious payments, or the sureties themselves may claim the same credits, if they chance to learn of the facts, would tend manifestly to promote deceit and injustice. It would, moreover, be in violation of the spirit of the law which favors the surety, and demands of the creditor the practice toward him of the utmost good faith. There is no conceivable equity in favor of such a rule, and the only legal basis for it is a bare technicality, which, in most cases, is false and wrongful in its application. It declares that to be no consideration which the debtor made a sacrifice to pay, and which the creditor accepted as desirable and sufficient, and of which, in many, and perhaps in most, cases, he gets the full benefit.

But even this technical doctrine which reverses the theory of creation, that all things were made of nothing, and makes

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nothing of something, is opposed by the other doctrine, already alluded to, that the right to plead the usury is the personal privilege of the debtor. The creditor should not be permitted to obtain a benefit by rescinding his usurious exactions. The law against usury was designed for the purpose of shielding the debtor against the creditor, but the doctrine contended for would make it a two-edged sword in the latter's hand.

In *Billington v. Wagoner*, 33 N. Y. 31, the plaintiff claiming and insisting that the agreement was void, on the ground that it was usurious, and, therefore, did not amount to a consideration to extend the time of payment, the court said: "But assuming that the agreement, made by the plaintiff with the principal debtor, was usurious, and therefore, in the language of the statute, void, can the plaintiff interpose that objection? The defendants claim it to be a valid and binding agreement. They are estopped from ever hereafter setting up that it was void, and, assuming it to be valid, the consequences resulting therefrom are the discharge of the sureties and the postponement of the plaintiff's right of action against the principal debtor, until the expiration of the postponed time of payment. Although the statute uses the language that any usurious note, contract, etc., shall be void, yet it is not always so regarded, as it is in the power of the party who can avail himself of that defence to waive it. * * * But this defence or objection to the contract, that it is void on account of usury, can only be alleged or set up by the party bound by the original contract to pay the sum borrowed, or his sureties, heirs, devisees or personal representatives." *Reynolds v. Ward*, 5 Wend. 501.

In *La Farge v. Herter*, 4 Barb. 346, the court says: "It does not lie in the mouth of La Farge, to set up his own illegal conduct, and to allege that his own bond and mortgage are void for usury; and elect to treat them as void for that reason. It is the victim of the usury, and not the usurer

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himself, that can set up against a contract that it is usurious and void."

In *La Farge v. Herter*, 5 Seld. 241, RUGGLES, C. J., said: "The taking of usury is a misdemeanor by statute, and the agreement to take it is in the eye and in the language of the law, corrupt. The parties, however, do not stand *in pari delicto*. It is oppression on one side and submission on the other. The borrower therefore may set up usury for the purpose of avoiding a contract tainted with it, but the lender can not."

To the same effect see the following cases, many of which, and especially the more recent, fully support the conclusion which we have announced: *Kenningham v. Bedford*, 1 B. Mon. 325; *Billington v. Wagoner*, 33 N. Y. 31; *Kelly v. Gillespie*, 12 Iowa, 55; *Corielle v. Allen*, 13 Iowa, 289; *Wheat v. Kendall*, 6 N. H. 504; *Grafton Bank v. Woodward*, 5 N. H. 99; *Danforth v. Semple*, 73 Ill. 170; *Myers v. First National Bank*, etc., 78 Ill. 257; *Hamilton v. Prouty*, 50 Wis. 592; *Austin v. Dorwin*, 21 Vt. 38; *Turrill v. Boynton*, 23 Vt. 142; *Smith v. Hyde*, 36 Vt. 303; *Berry v. Pullen*, 69 Me. 101; S. C., 31 Am. Rep. 248; *Armistead v. Ward*, 2 Pat. & H. (Va.) 504. See, also, *Camp v. Howell*, 37 Ga. 312; *Cox v. Mobile*, etc., *R. R. Co.*, 44 Ala. 611; *Stillwell v. Aaron*, 69 Mo. 539; S. C., 33 Am. Rep. 517.

It is true, there is a conflict of authority on the subject. Among the cases not in harmony with the foregoing, may be cited, *Cornwell v. Holly*, 5 Rich. S. C. 47; *Jenness v. Cutler*, 12 Kans. 500; *Hartman v. Danner*, 74 Pa. St. 36; *First National Bank*, etc., v. *Lineberger*, 83 N. C. 454; S. C., 35 Am. Rep. 582; *Howell v. Sevier*, 1 Lea (Tenn.) 360. Several of these cases rest, to some extent, on the authority of *Vilas v. Jones*, 1 N. Y. 274, which is shown to be overruled in *Billington v. Wagoner*, *supra*.

If the contract were absolutely void, on account of the

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usurious taint, we might be forced, possibly, to a different conclusion. But it is only voidable, and that not at the option of the lender. The right of rescission and recoupment is personal to the debtor, his heirs, representatives, or sureties. The creditor who has received the usury has no right to restore it, or credit it on the debt, and thereby release himself from his engagement to give time, and especially after the stipulated time has gone by, on the ground that his agreement was without sufficient consideration.

The judgment is affirmed, with costs.

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No. 7830.

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PRACTICE.—Application to Set Aside Judgment.—Demurrer.—Where a demurrer was filed to a complaint, under sec. 99, 2 R. S. 1876, p. 82, to set aside a judgment, and on the hearing the court announced that "The submission of the demurrer was and must be regarded as a full submission of the cause upon the facts stated in the motion," and this announcement was "acquiesced in by the parties," the plaintiff on appeal can not complain of the ruling of the trial court so announced.

SAME.—Final Judgment.—In such case, where the evidence is agreed to upon submission of the demurrer, the party demurring is entitled to final judgment, on a decision in his favor.

SAME.—Motion to File Amended Complaint.—In such case, a motion of the plaintiff for leave to file an amended complaint was correctly overruled. A party can not amend after a final decision against him.

SAME.—Illness of Defendant's Wife.—Residence Remote from County Seat.—Default.—Excusable Neglect.—Under sec. 99, 2 R. S. 1876, p. 82, an excuse for not giving his case attention, that the defendant was detained at home, sixteen miles from the county seat, by the serious illness of his wife, is sufficient; and he can not be justly charged with inexcusable neglect if he suffers a default because of his failure for such cause to appear at the time the cause was set down for trial.

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SAME.—*Meritorious Defence.*—*Pleading.*—In addition to showing a reasonable excuse, the party must show that there is a meritorious and valid defence to the action. It is not sufficient to aver, in general terms, that the defendant has a meritorious defence. The facts constituting the defence must be fully stated, in order that the court may judge whether there is, or is not, a meritorious defence.

SAME.—*Demurrer in Law and to Agreed Evidence.*—Where a case was submitted upon demurrer, with an agreement, by acquiescence, that the facts be taken as true, exhibits accompanying the complaint constituted matters of agreed evidence, although not proper as matters of pleading, and the complaint itself, by agreement of the parties, was at once a pleading and an instrument of evidence.

SAME.—*Bill of Exceptions.*—In such case, the verified complaint need not be incorporated in a bill of exceptions to become a part of the record, and a reference to it in the bill shows plainly that it was acted upon as both pleading and evidence already in the record.

Woods, J., dissents.

From the Shelby Circuit Court.

J. B. McFadden and J. W. Tomlinson, for appellant.

H. H. Daugherty, T. B. Adams and L. T. Michener,
for appellees.

ELLIOTT, J.—This was an application by the appellant to set aside a judgment entered against him at a previous term of the Shelby Circuit Court.

A demurrer was filed to the complaint by the appellees, and, when the cause came up for argument, the court announced that “The submission of the demurrer was and must be regarded as a full submission of the cause upon the facts stated in the motion.” “This determination was,” as the record states, “acquiesced in by the parties.” As no objection was then interposed by the appellant, he is not now in a situation to here complain of the ruling of the court announced at the time the demurrer was submitted.

It is claimed that the court did right in treating the submission of the demurrer as a submission of the cause upon the merits, independently of the agreement of the parties. It is true that it was said in *Nord v. Marty*, 56 Ind. 531, in a proceeding such as that here under examination, that “This

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was tantamount, in our opinion, to a submission of the cause to the court below for a hearing on the facts set out in the verified complaint.'" This language must be considered in connection with the facts of the case then under consideration, and, when thus taken, it ought not to be construed as laying down the broad doctrine, that a party, by demurring to a complaint to set aside a default and judgment, concludes himself from controverting the facts stated as showing excusable neglect, in case his demurrer is overruled. Nor, on the other hand, if the demurrer is sustained, should it be considered as entitling the demurring party to a final judgment as if a trial had been had upon the evidence, except in cases where the parties elect to so treat it. But whatever may be the true rule where there is no agreement of parties, it certainly is proper to treat the submission as upon the merits, where there is, as here, an agreement to that effect.

The court sustained appellees' demurrer to appellant's complaint. Upon the announcement of this ruling the appellant asked leave to file an amended complaint. The court refused to permit this to be done. There was no error in this ruling. The parties by their agreement had submitted the cause "upon the facts stated in the motion." The decision of the court was, under this agreement, a final one. When the ruling of the court was announced, the right of appellant to amend or dismiss was gone. A party can not amend after a final decision has been entered against him.

The remaining question is as to the sufficiency of the facts stated in the verified complaint to entitle appellant to the relief asked. The excuse for not giving the case attention was that the appellant was detained at his home, sixteen miles from the county seat, by the serious illness of his wife. We regard this as a sufficient excuse. A man not only may, but should remain with his wife when she is seriously and dangerously ill, and he can not be justly charged with inexcusable neglect if in so doing he suffers a default because of

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his failure to appear at the time the cause was set down for trial. We are not to be understood as holding that it is every case of illness of the wife which will justify the husband in permitting the trial day to pass without attention ; but in this case the allegations upon this branch of the motion are unusually full and strong.

It is not, however, sufficient to show a reasonable excuse for neglecting or failing to appear at the time appointed for trial, but it must also be shown that there is a meritorious and valid defence to the action. Appellees insist that the verified complaint is defective in this particular, because the character of the defence is not set out in the body of the pleading. It is no doubt true, as counsel insist, that it is not sufficient to aver in general terms, that the defendant has a meritorious defence. The facts constituting the defence must be fully stated in order that the court may judge whether there is, or is not, a meritorious defence.

The verified complaint of appellant files copies of the complaint and answer in the cause in which the default and judgment were rendered, and properly designates them as exhibits. It is also stated that "The plaintiff further shows to the court that from his own knowledge and information he believes the matters and things alleged by him in his answer herein are true in substance and in fact, and he further avers that he verily believes he could and would have fully established the truth of the same, had he been present in court at the time the said cause was called for trial in this court as aforesaid."

The appellees insist that these exhibits were no part of the complaint. If the pleading is to be regarded as a complaint in the strict sense of the term, then this contention must be held to be correct, for it is firmly settled that copies of instruments filed as exhibits which do not constitute the foundation of the action or defence are not parts of the pleading with which they are filed. From this rule we have

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not the slightest inclination to depart. But the case in hand is not within either the letter or the spirit of the rule.

We have already declared that appellant was bound by the ruling of the court that the submission should and would be regarded as a submission upon the facts stated in the complaint or motion. We hardly need add, so also were the appellees. The motion was, therefore, by agreement of both parties submitted for final hearing and determination upon the merits. The matters stated in the affidavit were conceded to be true, not as matter of pleading, but as matter of evidence. This admission was not as to part only of the matters stated in the motion, but as to all. Among these matters thus conceded to be true, was the fact that the appellant did have a meritorious defence to the action in which the judgment and default were entered. The exhibits which accompanied the verified complaint were, by the theory adopted by the court and assented to by the parties, parts not merely of a pleading, but of an instrument of evidence. Exhibits of collateral instruments are proper as matters of evidence, although not proper as matters of pleading. Upon the hearing, the paper and the accompanying exhibits were treated as evidence, and were not regarded as pleadings under consideration upon demurrer. The verified complaint, although treated as evidence by the agreement of parties and the action of the court, did not lose its character as a complaint or pleading. It still remained a pleading, although it had added to it the character of an instrument of evidence by the agreement of the parties. It was in the record as the foundation of the proceeding, and did not get out of it when the parties agreed that it should be regarded as evidence.

The pleadings in the original action are, it is true, referred to as exhibits, but, as set out in the record, they precede the affidavit attached to the complaint. In the affidavit these, among other, statements are made, to wit:

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"That he [appellant] can, as he verily believes, fully establish his said defences to said action, as set forth in his answers hereto annexed, marked exhibit 'B,' all of which defences this affiant believes to be true in substance and in fact, as set forth in his said answer, marked exhibit 'B.' " We think the answers are so blended with the body of the complaint, and so interwoven with the statements of the affidavit attached to the complaint, that it is impossible to sever them. The court must have had all the papers before it, and we must regard the decision as being based thereon.

Appellees insist that we can not consider the question upon the ruling of the court below, because the verified complaint is not incorporated in the record by bill of exceptions. We do not think this position can be maintained. Taking the recitals of the bill of exceptions in connection with the pleadings forming part of the record, and the entire proceedings in the cause are fully and clearly exhibited. The bill of exceptions states "that the said cause was called for trial, when the said Bodmer and Lee filed their demurrer to the motion herein, at which time the court notified each party that the submission of the demurrer was, and must be, regarded as a full submission of the cause upon the facts stated in the motion, which was acquiesced in by each party, and the said motion was thereupon, by the parties, submitted to the court upon said motion; such proceedings were thereupon had in said cause that the court sustained the demurrer to said motion, to which the petitioner, Slagle, at the time excepted; and the court thereupon proceeded at once to render judgment upon said motion, to which the petitioner, at the time excepted." The reference to the motion which was in the record, not only properly, but as the foundation of the whole proceeding, shows plainly upon what the court acted. Not only were the facts stated in the motion confessed by the demurrer, but they were admitted

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by the agreement which the parties accepted at the command of the court. The demurrer and motion were already in the record, the agreement was brought into it by the bill, and all material matters are, therefore, fully exhibited in the record before us.

The agreement did not admit as true some part only of the motion. It admitted all the facts stated in the motion. Regarded as evidence, the principal instruments, with its annexed exhibits, were fully before the court below, and are fully before us. It is legally impossible to sever the component parts of the motion, for the submission was upon the whole motion, and not upon any part or parts thereof.

Judgment reversed, at costs of appellees.

Woods, J., dissents.

No. 7740.

POTTS v. THE STATE, EX REL. OGG.

PRACTICE.—Writ of Mandate.—How Obtained.—A writ of mandate is properly obtained upon a motion in open court, founded upon an affidavit or petition sworn to and filed.

SAME.—Alternative Writ, How Served and Returned.—An alternative writ of mandate is served by delivering the writ itself to the party, and the sheriff's return of service is made upon a certified copy of the writ.

SAME.—Demurrer to Complaint.—A demurrer to the complaint or petition, or affidavit, and the order or writ issued thereon, raises the question of the sufficiency of the cause of action.

SAME.—Answers Equivalent to Return.—Demurrer.—Reply.—In such case, answers to a complaint may be regarded as constituting substantially a return to the writ, and may be demurred or replied to.

MANDATE.—Township Trustee.—Supervisor of Highways.—A complaint, affidavit or petition, on the relation of a supervisor of highways, against the trustee of the township, alleging that the relator had allowed a laborer for work done, and had given him an order for its payment, and that said trustee, on demand, refused to pay said order out of

75	336
148	561
148	562
75	336
160	14
75	336
161	192
75	336
164	107
75	336
165	485
75	336
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moneys in his hands applicable to its payment, contains facts sufficient to warrant the issuing of an alternative writ, and, on proper proof, to warrant a judgment that a peremptory writ of mandamus issue against the defendant, commanding him to pay said order from the road tax in his hands.

SAME.—*Practice.—Summons.*—A summons is not necessary in a proceeding for mandate. The alternative writ is the proper process.

From the Hancock Circuit Court.

M. Marsh and J. H. Mellett, for appellant.

A. L. Ogg, for appellee.

BICKNELL, C. C.—The appellee's relator, Adams L. Ogg, filed a complaint in the clerk's office of the Hancock Circuit Court, entitled as follows:

“Hancock Circuit Court, fall term, 1878. The State of Indiana, on the relation of Adams L. Ogg, *v.* William Potts. Affidavit, Complaint and Petition for writ of Mandamus.”

It began as follows: “The plaintiff, Adams L. Ogg, being duly sworn, complains of the defendant, William Potts.” It averred that Ogg was Supervisor of Highways for district No. 12, in Centre township, in the county of Hancock, and was also a freeholder and taxpayer resident in said district; that he, in the year 1877, duly notified the hands in said district, and had the road tax for that year worked out, pursuant to the statute, except a delinquency of \$47, which was not paid, and which he duly reported in his annual report for 1877, as due to that district; that said \$47 was collected by the treasurer of Hancock county, and was by him paid over to the defendant, William Potts, who was the trustee of said Centre township; that in 1878 said Ogg, as supervisor of said district, employed Robert Miller to do certain necessary work on the highways thereof; that said work was properly done, and was of the value of \$25.50; and that Ogg, as supervisor, gave Miller an order on Potts, as trustee, for said \$25.50, which order was as follows:

Potts v. The State, *ex rel.* Ogg.

"STATE OF INDIANA, HANCOCK COUNTY.

Robert Miller, with Centre Township in Account, Di.	
To labor, in repairing public highways in road dis-	
trict No. 12, seven days, team and driver - - -	\$21.00
Four and a half days manual labor - - - - -	4.50
	<hr/>
	\$25.50

"William Potts, Trustee of Centre Township.

"Sir :—The work itemized in the above bill of Robert Miller was done by my order ; the claim is correct and just. You will please pay it out of the fund (forty-seven dollars) now in your official possession to the credit of said district No. 12, the said fund being a part of the road tax, levied on property within said district, for the year 1877, collected by the treasurer of Hancock county, and by him paid to you since the last June settlement.

ADAMS L. OGG,

October 15th, 1878. Supervisor District."

That said Potts, on demand made, refused to pay said order.

The complaint prayed for an order of the court, commanding said Potts to pay said claim out of the fund aforesaid, and to set apart and appropriate to the benefit of the highways of said district all the remainder of said fund of \$47, or show cause why he should not. The complaint was subscribed and sworn to by the said Adams L. Ogg, and was endorsed with a direction to the clerk to issue a summons thereon, returnable November 2d, 1878.

The issuing of a summons was altogether superfluous, and the foregoing was not the right mode of proceeding to obtain a writ of mandate. Such a writ is properly obtained upon a motion in open court, founded upon an affidavit or petition sworn to and filed. The appellee, therefore, on the 22d day of October, of October term, 1878, of the Hancock Circuit Court, filed in that court, in open court, his said com-

Potts v. The State, *ex rel.* Ogg.

plaint, duly verified, as aforesaid, and thereupon moved for and obtained an order of the court, "that the said defendant, William Potts, as such trustee as aforesaid, be commanded to appear in this court on the 18th day of the present term thereof, the same being the 2d day of November, 1878, and answer the said complaint, and to show cause, if any he have, why the prayer of said complaint shall not be granted, and the moneys being and remaining in his hands, of the road taxes collected of property within said road district No. 12, be set apart by him for, and applied to, the benefit of said road district and the public highways therein situate, and to the payment of orders drawn by said relator, for work and labor performed thereon, and that a certified copy of this record and order be directed to, and served on, the said defendant, as required by law, returnable on said 2d day of November, A. D. 1878."

This order may be regarded as an informal alternative mandate, although strictly an alternative mandate requires the party to do the thing demanded, or show cause why it is not done. The mode of service directed in this writ was wrong ; an alternative writ of mandate is served by delivering the writ itself to the party, and the sheriff's return of service is made upon a certified copy of the writ. *The Board of Commissioners, etc., v. The State, ex rel.*, 61 Ind. 75 ; Practice Act, sec. 740. The party defendant is also required to make his return to the writ, which is in the nature of an answer. *Ib.* ; Practice Act, sec. 742. Formerly, the writ was objected to by a motion to quash, and this motion could be made only after a return made by the party. *Rex v. The Margate Pier Co.*, 3 B. & Ald. 229. And defects in the affidavit or petition were good grounds for quashing the writ ; but, under our statute, the writ is held to be in the nature of a complaint, and the defendant may

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demur to it or plead to it as in an ordinary action. *The Board of Commissioners, etc., v. The State, ex rel.*, 61 Ind. 379. The return of the party was always traversable, and regulated by the ordinary rules of pleading, *Rex v. The Mayor, etc.*, 2 T. R. 456; except that nothing could be intended in a return. *Rex v. The Mayor, etc.*, 2 Salk. 431. Now, the return may be in separate paragraphs, and may be met by reply or by demurrer. *The Board of Commissioners, etc., v. The State, supra.*

In *Jessup v. Carey*, 61 Ind. 584, a complaint was filed, praying for a mandate, but no alternative writ was issued. The defendants appeared and answered the complaint, as in ordinary cases. The court said: "Upon his affidavit filed, the appellee should have moved the court for an alternative writ of mandate. * * This alternative writ of mandate would then have constituted the plaintiff's complaint, or cause of action; and upon it issues of law or fact might have been joined, as in other cases."

In the subsequent case of *Gill v. The State, ex rel.*, 72 Ind. 266, there was a complaint or petition; there was also an alternative writ of mandate, followed by a motion to quash the writ, a motion to dismiss the complaint or petition, and a demurrer to the complaint or petition; there was also a return to the writ of mandate, and a demurrer to that return. The court, in this case, modified its previous rulings, hereinbefore cited, and held that the petition and writ must be taken together, and that the writ could not be quashed for failing to recite the material facts, if the petition was sufficient, and that "The alternative writ, when issued, will be taken as in the nature of a complaint in the cause, and must show what is claimed, and in itself, or in connection with the complaint, petition or affidavit on which it issued, show the ground on which the claim is made; and the facts stated must be sufficient in law to entitle the party to the writ."

Potts v. The State, *ex rel.* Ogg.

Following this decision, we must hold that the demurrer in the case at bar properly raises the question as to the sufficiency of the cause of action.

The facts stated in the affidavit, complaint or petition, fully warranted the issuing of an alternative mandate. Acts 1877, p. 135, sec. 29 ; *The State, ex rel., v. Hamilton*, 5 Ind. 310 ; *The State, ex rel., v. Buckles*, 39 Ind. 272 ; *Hamilton v. The State, ex rel.*, 3 Ind. 452 ; 1 R. S. 1876, p. 855.

After the sufficiency of the cause of action had been thus tested, the next proper proceeding would have been a return to the writ. The statute requires that "the person, body or tribunal to whom the same shall be directed and delivered, shall make return, and for neglect to do so, shall be proceeded against as for a contempt." Practice Act, sec. 740. The statute further provides that, when a return is made, issues of law and fact may be joined thereon. The appellant, however, in the case at bar, made no formal return ; instead thereof, he filed an answer, which commenced thus : "The defendant, for answer to the motion, says," etc., and continued thus : "for further answer to said motion and affidavit, the defendant says," etc.

The court sustained demurrers to each of the second, third and fourth of these defences, and the cause was tried by the court without a jury, upon the cause of action and the general denial. The court found for the plaintiff's relator, and rendered judgment "that a peremptory writ of mandamus issue against the said defendant, William Potts, commanding him to pay Robert Miller, from the road tax of road district No. 12, of Centre township, Hancock county, Indiana, the sum of twenty-five $\frac{60}{100}$ dollars, and that said defendant pay the costs of the suit." We think the answers aforesaid may be regarded as constituting substantially a return to the writ, although they are not such in form ; that the issue was properly before the court.

Reeves v. Reeves.

The appellant moved for a new trial, and alleged reasons therefor as follows:

1st. That the proceeding was not sustained by the evidence;

2d. That the finding was contrary to law;

3d. That the finding was contrary to the evidence.

The motion for a new trial was overruled, and the appeal followed. The errors assigned by the appellant are:

1st. The court erred in overruling the demurrer to the affidavit and motion;

2d. The court erred in sustaining the demurrs to the second, third and fourth paragraphs of the answer;

3d. The court erred in overruling the motion for a new trial.

The second, third and fourth paragraphs of the answer were properly held insufficient. The court committed no error in overruling them. The cause of action, although somewhat informal, was substantially sufficient. The finding of the court was right upon the evidence. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is, therefore, ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, affirmed, at the costs of the appellant.

No. 9089.

REEVES v. REEVES.

HUSBAND AND WIFE.—Parent and Child.—Divorce.—Custody of Child.—Habeas Corpus.—Evidence.—Upon the trial of an application by a divorced wife for a writ of *habeas corpus* against her divorced husband, and her verified complaint for the custody of their child, evidence that the child was five years old, weighing but a little over thirty

Reeves v. Reeves.

pounds, and was not a hearty boy, sufficiently sustains a finding of the trial judge in favor of the mother, and a judgment that the care, custody and control of the child be given to her.

SAME.—In such case, the mother, unless an unfit person, ought to have the care, custody, and control of the child.

From the Judge of the Huntington Circuit Court, in vacation.

J. C. Branyan, C. W. Watkins and M. L. Spencer, for appellant.

A. Moore and L. P. Milligan, for appellee.

Howk, C. J.—This is an appeal from the order and judgment of the judge of the Huntington Circuit Court, in an application for a writ of *habeas corpus*. On the verified complaint of the appellee, the mother, against the appellant, the father, of Glennie L. Reeves, the infant son of the parties, aged five years, a writ of *habeas corpus* was issued, directed to the appellant, and commanding him to have said Glennie L. Reeves before the judge of said court, at the time and place named in said writ. Afterward, the parties appeared before the said judge in vacation, and the appellant answered the appellee's complaint, and, upon a trial then had, a finding was made by the judge of said court in favor of the appellee. The appellant's motion for a new trial having been overruled, and his exception saved to the ruling, it was ordered, adjudged and decreed by the judge of said court, that the care, custody and control of the said Glennie L. Reeves be delivered to the appellee.

From this judgment the appellant prosecutes this appeal, and has here assigned, as error, the decision of the judge below, in overruling his motion for a new trial. The causes assigned for such new trial, in the motion therefor, were, in substance, that the finding and decision of the judge of said court were contrary to law, and were not sustained by sufficient evidence. It will be readily seen, therefore, that the questions presented for the consideration of this court, by

Reeves v. Reeves.

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1st. That the proceeding was not sustained by the evidence;

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1st. The court erred in overruling the demurrer to the affidavit and motion;

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PER CURIAM.—It is, therefore, ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, affirmed, at the costs of the appellant.

No. 9089.

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Reeves v. Reeves.

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From the Judge of the Huntington Circuit Court, in vacation.

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From this judgment the appellant prosecutes this appeal, and has here assigned, as error, the decision of the judge below, in overruling his motion for a new trial. The causes assigned for such new trial, in the motion therefor, were, in substance, that the finding and decision of the judge of said court were contrary to law, and were not sustained by sufficient evidence. It will be readily seen, therefore, that the questions presented for the consideration of this court, by

Reeves v. Reeves.

the record of this cause and the error assigned thereon, are wholly dependent for their proper decision upon the evidence adduced upon the trial below. This evidence is in the record, and consisted chiefly of the testimony of the parties to the suit. We deem it unnecessary for us to set out the evidence at length, in this opinion, but we will give a summary of the facts it tended to establish.

The appellant and the appellee had been husband and wife, and the child in controversy was born in lawful wedlock. About three years prior to the commencement of this suit, while the parties were living in Nebraska, the appellant put the appellee and the child on the cars and sent them to her brother. They had since lived separately, and for the greater part of the time the appellee and the child had lived with her brother, in DeKalb county, in this State, who had given them a home. During this time, the appellant made no provision for the support of the appellee or of the child; but by her own labor, and with her brother's assistance, she supported herself and the child. In April, 1879, the appellant came to Huntington county, in this State, and had lived there since with his brother-in-law; and in November, 1879, he had obtained a divorce from the appellee, in Nebraska, without any actual notice to her of his suit therefor.

A short time before the commencement of this suit, the appellant went to the appellee's home, in DeKalb county, and in her temporary absence, without her knowledge or consent, seized the said child and forcibly and hurriedly carried him to Huntington county. The child was five years old, weighing but a little over thirty pounds, and was not a hearty boy.

The foregoing are the material facts of this case, we think, as shown by the evidence in the record; and upon these facts we can not say that the judge below erred, either in overruling the appellant's motion for a new trial or in his judgment awarding the care, custody and control of the

Abell v. Riddle.

child to his mother, the appellee. It was the duty of the judge, and he was authorized by law, to make such an order in the case as would be for the protection of the infant boy. Father, mother and child were all present before the learned judge who tried this case, and he had much better facilities and opportunities than we can have for determining which of the two parents ought, under the facts of this case, to have the care, custody and control of the child. In such a controversy as this, it seems to us that the mother, unless she is shown to be an unfit person (which was not shown in this case), ought to have the care, custody and control of a delicate boy of the tender age of five years. We are of the opinion, therefore, that the finding of the judge below, in the case at bar, was not contrary to law, and was sustained by sufficient evidence. The motion for a new trial was correctly overruled.

The judgment is affirmed, at the appellant's costs.

No. 7668.

ABELL v. RIDDLE.

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149 414

EXECUTION. — Proceedings Supplementary. — Affidavits. — Practice. —
Where proceedings supplementary to execution are instituted by filing two separate affidavits stating causes therefor, and each closing with a separate prayer for relief, their sufficiency should be considered separately.

SAME.—Exemption.—In proceedings supplementary to execution under section 522 of the code, 2 R. S. 1876, p. 231, the affidavit must show that the property which it is sought to reach, together with the other property claimed by the judgment debtor as exempt from execution, exceeds the amount exempt by law, and an averment that the property "is not exempt from execution," is insufficient, and is not aided by the averment that the debtor is a single and unmarried man, for whether single or unmarried, if a resident householder, he is entitled to the exemption.

Abell *v.* Riddle.

PRACTICE.—*Exception.*—*Demurrer.*—*Evidence.*—*Verdict.*—Where an exception has been saved to a ruling on the demurrer to a pleading, it can not be aided by reference either to the evidence or to the verdict.

From the Crawford Circuit Court.

B. P. Douglass, S. M. Stockslager and S. D. Luckett,
for appellant.

N. R. Peckinpaugh and W. T. Zenor, for appellee.

Woods, J.—Proceedings supplementary to execution. The appellee instituted the proceedings by filing two affidavits, to which the defendant Abell, who alone appeals, filed a general demurrer, and to each of the affidavits a separate demurrer, for want of facts, and, having saved exceptions to the overruling thereof, has made the proper assignment of error. The appellee claims that the two affidavits are to be treated as constituting, together, one application, but the appellant insists that the sufficiency of each must be determined by itself.

The effort of the appellee was to subject a particular claim of the appellant, a judgment against his co-defendants, to the payment of the appellee's judgment, and under the rule announced in *Banty v. Buckles*, 68 Ind. 49, the application constitutes a complaint, the sufficiency of which may be tested by a demurrer. This is in accordance with the recent decisions, wherein it is held that, in such cases, issues of fact may be formed, and a jury trial had, as a matter of right. *McMahan v. Works*, 72 Ind. 19; *The Toledo, etc., R. W. Co. v. Howes*, 68 Ind. 458.

In his first affidavit the appellee shows his recovery, in a suit in attachment against the appellant, before a justice of the peace of Crawford county, of a personal judgment and an order for the sale of the attached goods, the issuing of the order of sale to the constable, a sale duly made, the proceeds applied, leaving a remainder due on the judgment, an execution thereafter issued, the sale thereon of all goods

Abell v. Riddle.

found by the constable, leaving a stated remainder due upon the judgment, a return of no property out of which to make the balance, a transcript of the judgment docketed in the office of the clerk of the county, execution issued by the clerk to the sheriff, and returned *nulla bona*; that said Abell is a resident of the county, and has, in the circuit court of the county, a judgment against his co-defendants for a sum named, which he unjustly refuses to apply towards the satisfaction of the plaintiff's demand.

The second affidavit, except that nothing is said of the attachment, shows a judgment in favor of the appellee, against the appellant, in all respects the same as that described in the first affidavit, the filing and docketing of a transcript thereof in the clerk's office, the issuing of an execution thereon to the sheriff, a return of *nulla bona*, the appellant's judgment in the circuit court against his co-defendants; that said judgment "is not exempt from execution;" that said Abell unjustly refuses to apply the same to the satisfaction of the plaintiff's judgment; and that the said defendant is "a single man and unmarried."

It is clear that each of these affidavits, closing as they do each with a separate prayer for relief, should be considered separately; but, whether taken singly or together, they do not show a complete right on the part of the plaintiff to have the appellant's judgment subjected to the payment of his judgment against the appellant. The proceedings are evidently brought under the 522d section of the code, which requires an affidavit that the amount of the indebtedness in favor of the principal defendant, which it is sought to reach and apply, "together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law." The allegation, that the appellant's judgment against his co-defendants "is not exempt from execution," is the statement of a legal conclusion only, and is not helped out by the averment that the debtor is a single

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and unmarried man. Whether married or single, if he was a resident householder, he was entitled to the exemption. *Carpenter v. Dame*, 10 Ind. 125; *Graham v. Crockett*, 18 Ind. 119.

The exception having been saved to the ruling on the demurrer, the pleading can not be aided by reference either to the evidence or to the verdict. *Johnson v. Breedlove*, 72 Ind. 368.

The judgment is reversed, with costs.

No. 7239.

**BUSCH ET AL. v. THE COLUMBIA CITY GERMAN BUILDING,
LOAN AND SAVINGS ASSOCIATION NO. 2.**

PROMISSORY NOTE.—Contract.—Reference to Conditions in Other Writings.—Pleading.—Complaint.—Copy.—A complaint upon a promissory note or other written obligation, "payable according to the conditions" in other written instruments, forming a part of the contract, must set out not only a copy of the note or obligation sued on, but also copies of the instruments referred to.

From the Whitley Circuit Court.

W. Olds, for appellants.

C. B. Tulley and J. Krider, for appellee.

NIBLACK, J.—This was a suit by the Columbia City German Building, Loan and Savings Association No. 2 against Frederick Busch, Joseph Kichler and Philip Anthes, upon a note or written obligation, as follows:

"For value received, — promise to pay to the Columbia City German Building, Loan and Savings Association No. 2, of Columbia City, Indiana, the sum of two hundred dollars, with interest at six (6) per cent. per annum, payable

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monthly, without any relief from valuation or appraisement laws. This note is payable according to the conditions in the mortgage securing the same, and the constitution, by-laws and regulations of said association.

"This obligation is given for money loaned under the constitution; by-laws and regulations of said association; and in case the said monthly interest, or any dues, fines or assessments, or any part thereof, shall remain unpaid for six months after the same become due, then and in such case this obligation shall thereupon immediately become due and collectible; but in case said interest and said dues, fines or assessments shall all have been paid as aforesaid, then the principal of this obligation shall become due on the 13th day of April, in the year 1881, or when the value of the assets of said association shall be sufficient to divide to each share of said stock the sum of two hundred dollars or its equivalent, and the said principal shall then be paid by applying a sufficient amount of the stock owned by the undersigned to the payment of said principal, and thereupon the undersigned shall cease to have any interest in the stock so applied, and the same shall be cancelled. Said obligator to keep the building on said premises insured in a good insurance company, in such sum as the directors may require, and the loss, if any, under such policy, to be made payable to said association, as collateral security hereto. And the mortgagors expressly agree to pay the sum of money above secured, without any relief from valuation or appraisement laws, and to pay the sum of ten per cent. on the above stated amount for attorney's fees and expenses in collecting said money, or any part thereof, if not paid at maturity or on demand. This obligation is given upon the further condition, that, if at any time the directors shall deem the security unsafe or insufficient, they may require additional security, and, if not given within the time granted, the whole

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amount of said principal and interest shall become due and collectible. This note is not transferable.

[Signed] "FREDERICK BUSCH,
 "JOSEPH KICHLER,
 "PH. ANTHES."

The complaint averred that this obligation was executed on the 11th day of August, 1873, and, after setting out the substance of the obligation, concluded as follows: "And the plaintiff avers that said defendants did not pay the interest due on said note for more than six months last past; that there is due as such interest on the same the sum of nine dollars, and that said defendants did not pay the dues, fines and assessments on the same according to the tenor of said obligation, or according to the conditions of the constitution, by-laws and regulations of said corporation, the plaintiff herein; that there is due and unpaid on said note in dues, fines and assessments the sum of twenty dollars; that this suit is brought to collect said note and money thereon due, and that a reasonable fee for the same would be twenty dollars, which is due and unpaid in whole or in part, a copy of which note or writing obligatory is filed herewith, marked exhibit 'A,' and made a part hereof; that there is due and unpaid plaintiff on the same, in principal, the sum of two hundred dollars, and the sum of nine dollars interest, and the sum of twenty dollars fines, dues and assessments, and the sum of twenty dollars attorney's fees; in all the sum of two hundred and fifty dollars," for which judgment was demanded.

Copies of the constitution, by-laws and regulations of the association were not filed with the complaint. Neither was any mortgage, or copy of a mortgage, filed with it; nor were any of those documents copied into the complaint, or otherwise referred to by it, except as above set forth.

A demurrer to the complaint, for want of sufficient facts,

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was overruled. Issue being joined there was a verdict and judgment for the plaintiff.

The first question presented to us is that of the sufficiency of the complaint.

It is insisted that, as the note was, by its terms, made payable according to the conditions of the mortgage given to secure it, and of the constitution, by-laws and regulations of the association, the conditions of the mortgage, as well as of the constitution, by-laws and regulations thus referred to, became a part of the note, and copies of them ought also to have been filed; that the copy of the note or obligation was, on its face, defective, for not being accompanied by such copies, and that, for this reason, the complaint was bad upon demurrer.

We think the objection to the complaint is well taken, and that the demurrer to it ought to have been sustained.

The conditions of the mortgage, as well as of the constitution, by-laws and regulations of the association, were referred to by the written obligation in such a way as to constitute them stipulations, which the appellants were required to perform, and, hence, to make them parts of the obligation in all essential respects. Those conditions, having thus become parts of the obligation, it was as necessary that they should be brought into, and made a part of, the complaint, as that any other portions of the obligation should be. Without those conditions the court was unable to give either a full or an intelligent construction to the real contract between the parties. The alleged copy of the obligation filed with the complaint, unaccompanied, as it was, by those conditions, was palpably an incomplete copy of the entire instrument, and this was apparent from the face of the paper so purporting to be filed as a copy. In legal contemplation, therefore, it can not be said that a copy of the obligation entered into by the appellants was filed with the complaint. For this reason, the complaint must be held to

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have been radically defective. The conclusion we have reached is fully sustained by the case of *Titlow v. Hubbard*, 63 Ind. 6, and for want of a sufficient complaint, the judgment will have to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

75	352
128	84
128	355
128	386
75	352
131	27
75	352
134	528
136	176
75	352
137	253
75	352
141	313
75	352
146	93
146	584

No. 7809.

OVER ET AL. v. SHANNON.

PRACTICE.—Pleading.—Real Estate, Action to Recover.—Answer.—Demurrer.—A defendant in an action for the recovery of real estate may give in evidence all defences under the general denial; but he may also plead specially, and when he does, and his answers are bad, it is error to overrule a demurrer to them.

SAME.—Ruling on Demurrer.—Answer.—Cases Disapproved.—A defendant is not harmed by a ruling sustaining a demurrer to a paragraph of answer, although good, if he has another paragraph under which the same matters are admissible in evidence; but it is otherwise where a plaintiff's demurrer to a bad answer is overruled. *Jordan v. D'Heur*, 71 Ind. 199; *Thomas v. Hamilton*, 71 Ind. 277; *Webster v. Bebinger*, 70 Ind. 9; *DeArmond v. Stoneman*, 63 Ind. 386; and *McGee v. Robbins*, 58 Ind. 463, intimating or sanctioning a different doctrine, disapproved.

REAL ESTATE, ACTION TO RECOVER.—Pleading.—Answer.—Exemption.—Title to Property.—In an action to recover possession of real estate, an answer of the defendant, alleging that he had claimed the property as exempt from sale on execution, and that the sheriff had wrongfully refused to allow his claim, but failing to allege that he had any title to such real estate, or any facts from which such an inference could be drawn, is insufficient on demurrer.

SAME.—Pleading.—Property Exempt From Sale on Execution.—In such action, a paragraph of answer setting up that the property was exempt from execution, and wrongfully sold by the sheriff to the plaintiff, but failing to show that the defendant took the steps required by law to secure the exemption of the property, is insufficient; and the allegation, that "the defendant filed with the sheriff a schedule of his property," is not sufficient to show the filing of such a schedule as the law requires.

Over *et al.* v. Shannon.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellants.

ELLIOTT, J.—The complaint of the appellants, who were the plaintiffs below, was for the recovery of the possession of real estate. The appellee answered in three paragraphs, to the second and third of which the appellants unsuccessfully demurred. Error is alleged upon the overruling of these demurrers.

It is true that the defendant in an action for the recovery of real estate may give in evidence all defences under the general denial, but it is also true that he may plead specially should he elect to do so. Where he does plead specially, and his answers are bad, it is error to overrule a demurrer to them. In *Vanduyn v. Hepner*, 45 Ind. 589, WORDEN, C. J., said: “The statute, it is true, provides that in actions to recover possession of real estate, every defence, whether legal or equitable, may be given in evidence under the general denial. 2 G. & H. 283, sec. 596. But it by no means follows that a defendant may not plead his defence specially. We think he may do so.”

A defendant is not harmed by a ruling sustaining a demurrer to a paragraph of his answer, although it is good, if he has another paragraph under which the same matters are admissible in evidence. The reason is obvious. The paragraph remaining in his answer enables him to secure the full benefit of all his evidence. His rights are in no wise abridged. It is otherwise where a plaintiff's demurrer to a bad answer is overruled. In such a case the plaintiff is necessarily injured, because that is adjudged a bar, which in law constitutes no defence whatever. The effect of a ruling upholding a bad answer is to adjudge, that, if the defence pleaded is proved, the defendant is entitled to a verdict. The plaintiff can not rightfully be driven to deny matters which constitute no bar to his action, and his confession

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would not entitle the defendant to a judgment. Nor can the plaintiff avoid such an answer by a reply, for in legal contemplation there is nothing to avoid. The only course which a plaintiff can pursue is to demur to the bad answer, and take the judgment of the court upon it. The question we are examining was presented in *Abdil v. Abdil*, 33 Ind. 460, precisely as it is here. In that case WORDEN, J., in delivering the opinion of the court, said : "In an action to recover real estate, all matters of defence can be given in evidence under the general denial ; and in such case, if good special answers are held bad, the error may be harmless, because the defendant can offer the matter pleaded, under the general denial, and avail himself of any question of law arising thereon by instructions, or otherwise. But where bad special answers are held good, it is not perceived that the plaintiff is in any way benefited by the general denial being in. He has no mode of availing himself of the objections to the answer but by demurrer, and that being overruled, if the answer is true in point of fact, his case is at an end." The rule declared in the case from which we have quoted is the correct one. Expressions indicating or sanctioning a different doctrine found in the cases of *Jordan v. D'Heur*, 71 Ind. 199, *Thomas v. Hamilton*, 71 Ind. 277, *Webster v. Bebinger*, 70 Ind. 9, *DeArmond v. Stoneman*, 63 Ind. 386, and *McGee v. Robbins*, 58 Ind. 463, are disapproved. The case of *Reagan v. Hadley*, 57 Ind. 509, is not directly in point upon the question here under examination, but if it were fully in point it would not avail appellee, for, in so far as it lends him any support, it is in conflict with the later case of *Johnson v. Breedlove*, 72 Ind. 368.

The second paragraph of appellee's answer is plainly insufficient. It alleges that he had claimed certain property as exempt from execution, and that the sheriff refused to allow his claim, but it does not show, directly or indirectly, that the appellants' title is founded on a sheriff's sale. For

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anything that appears in the answer, the appellant's title may have been derived by deed from persons with whom the appellee was in no way connected, either by privity of estate or privity of contract. The answer does not allege that the appellee had any title to said lot, nor are any facts stated from which any such inference can be drawn, although the utmost liberality of construction should be adopted. An execution defendant can not claim to exempt property in which he has no title, and it does not appear that the appellee ever had any title to the real estate described in the complaint. The answer confesses, but does not avoid, the averment of the complaint, that appellants are "the owners in fee of the real estate described."

The third paragraph of the answer alleges that appellants obtained judgment against appellee and two others; that execution was issued and levied on the real estate described in the complaint; that the appellee filed with the sheriff a schedule of his property, amounting to \$95.65, "and," to quote from the answer, "at the same time demanded that the remainder of the \$300 allowed him by law, the appellee being then a citizen and householder of the county, be set off to him in said real estate, to wit, \$204.25; that the sheriff refused to set off to him the amount allowed by law, but did sell said property to the appellants."

This paragraph is insufficient for the reason, among others, that it does not show that the appellee took the steps required by law to secure the exemption of the property in controversy. The allegation is that "the defendant filed with the sheriff a schedule of his property." This is far from showing the filing of such a schedule as the law requires. It does not appear that it contained all of the appellee's property; it does not appear that it was verified; nor does it appear that it "contained a full account of all property held at the time the writ was issued." For aught that appears, the appellee may have been the owner of other

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property when the execution was issued, and, indeed, of other property exceeding in value three hundred dollars when the writ was levied. The presumption is that the officer did his duty, and this presumption is not overcome by the allegation that appellee filed a schedule. It is incumbent upon the appellee to show the filing of such a schedule as the law requires, or the presumption that the sheriff did his duty must prevail. Our statute is clear and explicit upon this subject. It provides that, "until such inventory and affidavit shall be furnished to such officer, he shall not set apart any property to the execution defendant as exempt from execution." 2 R. S. 1876, p. 352; Acts 1861, p. 119.

Judgment reversed.

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No. 7871.

EMMONS v. HAWN.

CHATTTEL MORTGAGE.—Execution.—Sale of Property.—Where mortgaged goods and chattels have been levied upon by an officer, under an execution against the mortgagor, such officer will be entitled, as against the mortgagee, to the possession of such property for the purpose of selling the same subject to the mortgage.

SAME.—Purchase by Mortgagee at Sale Under Mortgage.—Title of Purchaser.

—**Levy and Sale.**—When, by the agreement of the mortgagor and mortgagee, and in accordance with the stipulations of the mortgage, the personal property therein described is sold at public auction to pay the mortgage debt, and the mortgagee, *bona fide*, becomes the purchaser thereof, he takes an absolute title thereto, freed from the lien of the mortgage; and the bare fact that, after his purchase, he left the property with the mortgagor, to be cared for by him, would not subject them to levy and sale as the property of the mortgagor.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

L. M. Campbell, for appellee.

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Howk, C. J.—In this action the appellee sued the appellant to recover the possession of five mules, the description and value of each of which were stated in the complaint. The appellee alleged that he was the owner and entitled to the possession of the five mules, which the appellant, on the 4th day of December, 1878, unlawfully and wrongfully took into his possession and converted to his own use, and still retained and held possession of, to appellee's damage in the sum of one thousand dollars. The suit was commenced on December 5th, 1878, and afterward, on December 17th, 1878, the appellee filed the affidavit required by law, and thereon obtained an order for the delivery of the possession of the mules to him. The cause having been put at issue and tried by a jury, a verdict was returned finding the mules to be of the value of \$275, and the property of the appellee, and finding for the appellee and assessing his damages at \$5.50. The appellant's motion for a new trial having been overruled, and his exception saved to this decision, the court rendered judgment on the verdict.

The appellant has here assigned as errors the following decisions of the circuit court:

1. In overruling his motion for a new trial;
2. In overruling his motion to quash the affidavit in replevin.

We find it necessary to a proper understanding of the questions presented for our decision, that we should first give a statement of the facts of this case, as shown by the record: On the 18th day of May, 1877, one Edmund Mahoney, of Hendricks county, executed a chattel mortgage to the appellee, Hawn, on the mules in controversy in this action, and divers other articles of personal property, to secure the payment of certain notes, described in said mortgage executed by said Mahoney to the appellee. It was stipulated in said mortgage, among other things, that if Mahoney made default in the mortgage debt, when it became

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due, it should then be lawful for the appellee, the mortgagee, to take immediate possession of the mortgaged property, and sell and dispose of the whole or so much thereof as might be necessary to pay such debt, interest, costs and expenses, and existing liens thereon, at public auction. On the 1st day of November, 1877, the mortgage debt became due, and Mahoney failed to pay any part of it, and it was then agreed between him and the appellee that the property should be advertised and publicly sold, according to the conditions of the mortgage. The appellee accordingly caused written notices to be posted in public places that he would sell the said property on the 1st day of December, 1877; and on that day he attended said sale, and, being the highest and best bidder, he became the purchaser of all the said property. After his said purchase, the appellee left the said mules with said Mahoney to feed and take care of.

In November, 1878, and until the commencement of this suit, the appellant, Emmons, was the sheriff of Hendricks county. On the 7th day of November, 1878, there came to the hands of the appellant, as such sheriff, an execution of that date, issued out of the court below on a judgment therein rendered, on the 10th day of June, 1876, in favor of Christian C. and Christian A. Nave, and against the said Edmund Mahoney, for the sum of \$193 and the costs of suit. When the appellant demanded property of said Mahoney, under said execution, he was informed by said Mahoney that he, Mahoney, did not own any property. The mules in controversy in this suit were then on the farm on which Mahoney lived, but the latter told the appellant that these mules were the property of the appellee, Hawn. Afterward, on the 4th day of December, 1878, by the direction of the execution plaintiffs, the appellant, as such sheriff, levied said execution upon the said mules as the property of said Mahoney, and kept them until a writ was issued in this suit therefor, when he delivered them to the appellee, Hawn.

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The above recited facts were fully established by the evidence in the record, without any conflict or contradiction therein. It is very clear therefrom that the verdict of the jury in this case was sustained by sufficient evidence, and that it was not contrary to law. The instructions asked for by the appellant's learned counsel, in the trial court, and their argument in this court, show very clearly, to our minds, that their theory of the case made by the evidence was radically erroneous. In both courts it is apparent that the appellant's counsel have assumed that the appellee claimed to be the owner, and entitled to the possession, of the property in controversy, solely as the mortgagee thereof under his chattel mortgage. If counsel were right in this assumption, there would be no room for doubt but that the verdict of the jury was contrary to law. For, in section 436 of the code of 1852, and re-enacted in section 510 of the civil code of 1881, it was provided, in substance, that goods and chattels, mortgaged as security for any debt or contract, might be levied upon and sold on execution against the mortgagor, subject to such mortgage, and that the purchaser should be entitled to the possession, upon complying with the conditions of the mortgage. In construing this section of the code, this court has often decided that where mortgaged goods and chattels have been levied upon by an officer, under an execution against the mortgagor, such officer will be entitled, as against the mortgagee, to the possession of such goods and chattels, for the purpose of selling the same subject to the mortgage. *Coe v. McBrown*, 22 Ind. 252; *Landers v. George*, 49 Ind. 309; *Olds v. Andrews*, 66 Ind. 147; *Sparks v. Compton*, 70 Ind. 393; *Herman Chattel Mortgages*, secs. 191, 192.

But the facts of this case, as shown by the evidence, do not sustain the appellant's theory of the case. These facts show that the appellee was, and had been for nearly a year before the commencement of this suit, the absolute owner

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of the property in controversy, and that as such owner, and not as mortgagee, he demanded, sued for, and recovered the possession of such property. When, by the agreement of the mortgagor and mortgagee, and in accordance with the stipulations of the mortgage, the personal property described in the mortgage was sold at public auction to pay the mortgage debt, we are of the opinion that the purchaser of the property took an absolute title thereto, freed and discharged from the lien of the mortgage thereon. There is no evidence in the record, which tends even to impeach the publicity, fairness or *bona fide* character of the appellee's purchase of the property ; and the bare fact that, after his purchase, he arranged with Mahoney to feed and take care of the mules in controversy, and left them in his custody for that purpose, would not subject them to levy and sale as the property of Mahoney.

Our conclusion is, that the trial court committed no error in overruling the appellant's motion for a new trial.

Upon the second error assigned, namely, the overruling of the motion to quash the affidavit in replevin, all that is said by the appellant's counsel, in his elaborate brief of this cause, is this : "The affidavit in replevin, filed in said cause, is clearly bad." Wherein the affidavit is bad, the learned counsel has failed to inform us, and we confess our inability to find any defect therein, if any exists. It seems to us to be in strict compliance with the requirements of the code. The motion to quash the affidavit was correctly overruled. We find no error in the record.

The judgment is affirmed, at the appellant's costs.

First National Bank of Crawfordsville v. Union School Township, etc.

No. 7783.

FIRST NATIONAL BANK OF CRAWFORDSVILLE v. UNION
SCHOOL TOWNSHIP, ETC.

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TOWNSHIP TRUSTEE.—Authority to Borrow Money.—School Corporation.

—While a township trustee has no authority to borrow money for the use of the school corporation, yet, for money borrowed and actually used for the benefit of the township, in a legitimate way, the township may be liable.

SAME.—Liability of Township.—Complaint.—A paragraph of complaint, in an action against a school township for money borrowed by the township trustee, which shows that the money was used for the purpose of paying corporate indebtedness, is sufficient, the liability arising not from the act of the trustee in borrowing the money and giving a note, but from the obtaining of the money and its application to the township's lawful uses.

From the Montgomery Circuit Court.

J. R. Coffroth and T. A. Stuart, for appellant.

W. P. Britton, M. W. Bruner and E. C. Snyder, for appellee.

Woods, J.—Complaint in six paragraphs, of which the first and second were dismissed, and a demurrer sustained to each of the others ; the court gave judgment for the appellee, the appellant excepting and refusing to amend. These paragraphs are, in substance, as follows :

Third. “The said plaintiff further complains of said defendant and says, that at the time hereinafter mentioned, and for a long time previous thereto, the said defendant was and still is a corporation for school purposes, duly organized pursuant to the laws of the State of Indiana, in such case made and provided ; and that John R. Robinson was the trustee of said corporation, duly elected, commissioned and qualified as such. That said defendant is indebted to the plaintiff in the sum of twenty-seven thousand dollars for moneys loaned ; that the same is due and remains unpaid,”—bill of particulars, etc.

The fourth paragraph alleges, *inter alia*, that the school township was largely indebted to different persons, for “build-

First National Bank of Crawfordsville v. Union School Township, etc.

ing and repairing of school houses in said township, and for fuel, furniture, school apparatus, etc., and being so indebted, and having no money with which to pay the same, did (in anticipation of the taxes for special school purposes, etc., then levied upon the taxable property in said township and thereafter to be collected therefrom, and for the purpose of paying such indebtedness), borrow from the plaintiff the sum of \$27,000."

The *fifth* paragraph is like the *fourth*, with the additional allegation, that, upon a settlement between the parties, there was found to be due the sum of \$6,000, and for such sum the appellee gave the appellant its promissory note, payable six months after date, with ten per cent. interest and attorney's fees.

The *sixth* paragraph is like the fifth, with the additional averment, that the moneys so borrowed by the appellee for the purpose of paying the corporate indebtedness, the appellee "did apply the same in the payment of such indebtedness."

Copy of note:

"\$6,000.00. CRAWFORDSVILLE, Ind., June 27, 1876.

"One hundred and eighty days after date, for value received, we jointly and severally promise to pay to the order of B. Wasson, Cashier, at the First National Bank, of Crawfordsville, Ind., six thousand dollars, with ten per cent. interest after maturity and attorney's fees, if this note should be collected by attorney, without relief from valuation or appraisement laws. The drawers and endorsers severally waive," etc. "Union Township, Montgomery County.

"JOHN R. ROBINSON, Trustee."

The principal question here involved has been recently decided by this court, in the case of *Wallis v. Johnson School Township*, *post*, p. 368, wherein, after a full and careful consideration of the authorities, including those cited in this case, and of the provisions of the statute relating to the subject, it was held that the trustee of a school town-

Utterback et al. v. Terhune.

ship has no power to borrow money; but at the same time the rule was recognized, as declared in *Bicknell v. Widner School Township*, 73 Ind. 501, that for money borrowed and actually used for the benefit of the township, in a legitimate way, the township may be held liable. It follows that, in sustaining the demurrers to the third, fourth and fifth paragraphs of the complaint, the court did right; but erred in sustaining the demurrer to the sixth paragraph, which is good, not because of the note therein set forth, but because it shows that the moneys so borrowed, for the purpose of paying the corporate indebtedness, the appellee did apply in the payment thereof. The liability to repay these moneys arises not from the act of the trustee in borrowing and giving a note for them, but from the obtaining and application of them to the appellee's lawful uses.

The judgment is reversed, with costs, and with instructions to overrule the demurrer to the sixth paragraph of the complaint.

No. 8068.

UTTERBACK ET AL. v. TERHUNE.

PARTITION.—Real Estate.—Pleading.—Complaint by Widow.—In a petition by a widow for partition of the lands of her husband, an allegation that she owned one-third of the land argumentatively asserted that she was the first wife, or a subsequent wife having children by her husband, alive at his death.

SAME.—Complaint by Heirs to Review.—A complaint by children against the widow, to review proceedings and judgment in partition, which shows that on their default partition was decreed in her favor, adjudging her to be the owner in fee simple of one-third of the land, and setting it off to her in severalty, although she was the third wife of their father, and had no children by him, was insufficient on demurrer.

SAME.—Widow not Presumed to Have Been Second Wife.—A widow will not be presumed to have been a second or subsequent wife.

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125	114
125	187
75	363
130	188
75	363
134	187
135	379
136	427
75	363
139	65
75	363
144	498
75	363
148	393
149	485
151	105
151	107
152	144
75	363
153	58
75	363
154	423
155	144
155	147

Utterback *et al.* v. Terhune.

SAME.—*Partition Gives no New Title.*—A judgment in partition does not, ordinarily or necessarily, vest in the co-tenants a new title, but each has the title he had before.

SAME.—*Surviving Wife Takes a Fee.—Descents.—Children of Former Wife Forced Heirs.—Statute Construed.*—Under section 24 of the statute of descents, 1 R. S. 1876, p. 412, the surviving wife takes a fee, and the children by a former wife take as forced heirs of the surviving wife, at her death.

From the Johnson Circuit Court.

T. W. Woollen and D. D. Banta, for appellants.

F. S. Staff, G. M. Overstreet and A. B. Hunter, for appellee.

MORRIS, C.—This action was brought by the appellants, the children and grandchildren of Garrett Terhune, to review a judgment and proceedings in partition, commenced in the Johnson Circuit Court, by the appellee against the appellants. The complaint is in two paragraphs. The second is admitted to be bad, and will not be noticed.

The first paragraph states that, on the 24th day of January, 1875, Garrett Terhune died intestate, seized of eighty acres of land in Johnson county, Indiana, leaving the appellee, his widow, and the appellants, his children and grandchildren, his only heirs, surviving him; that the appellee was the third wife of Garrett Terhune, and had no children by him; the appellants were his children by a former wife; that the appellee, on the 4th day of February, 1875, commenced proceedings in partition, in the Johnson Circuit Court, against the appellants, alleging that she was entitled to one-third of the real estate in dispute; that the appellants were served with process in said proceedings; that they made default; that the appellee was adjudged by said court to be the owner in fee simple of one-third of said land, and that the same had been set apart to her in severalty.

It is averred that there are errors apparent upon the face of said proceedings in partition, in this:

First. Because the petition in the partition proceedings

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does not state facts sufficient to constitute a cause of action.

Second. Because the petition does not allege the estate which said Nancy had in said land, whether a fee or a life-estate.

Third. Because the estate in said land awarded the appellee by the court is not predicated upon the complaint.

Fourth. Because the decree of the court enlarges the rights of said Nancy beyond the averments of the complaint.

Fifth. The same as the second.

Sixth. Because the judgment of the court gives the said Nancy a fee, when the facts stated in the complaint constitute a life-estate only.

The appellee, in her complaint in the partition suit, avers that the said Garrett Terhune died seized of the premises sought to be partitioned, leaving her, as his widow, and the appellants, as his heirs, surviving him; that she, as such widow, was the owner, and entitled to hold in severalty, one-third of the same; that the appellees, as his heirs, were the owner of two-thirds thereof; that she and they held such premises as tenants in common. She prays that her share may be set off to her in severalty.

The court, upon the default of the defendants in the partition proceedings, adjudged the appellee to be the owner in fee of one-third of said land, and ordered it to be set off to her in severalty, which was done.

The appellee demurred to the appellants' complaint. The demurrer was sustained. The ruling upon the demurrer is the only error assigned.

We think that the complaint in the partition suit contained facts sufficient to constitute a cause of action. We also think that the nature and quantity of the estate of the appellee were stated with sufficient certainty. The seizin and death of the husband, her survivorship as his widow, and the survivorship of the appellants as his heirs, sufficiently described her title to, and interest in, the land; and the allegation, that she and the appellants held the land as

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tenants in common, authorized the judgment of the court. We do not think it was for her to allege in her complaint whether she was a first or subsequent wife, nor whether she had or had not children by him, living at the time of his death. She will not be presumed to have been a second or subsequent wife. In her complaint for partition, she avers that she owned, as the widow of Garrett Terhune, one-third of the land in dispute. If, as such widow, she owned one-third of said land, then she must have been the first wife; or, if a second or subsequent wife, she must have had children by Garrett Terhune alive at the time of his death, for she could not otherwise take a fee in said land as widow. The allegation that she owned one-third of the land argumentatively asserted that she was the first wife, or a subsequent wife having children by her husband, alive at his death. *French v. Howard*, 14 Ind. 455; *Austin v. Swank*, 9 Ind. 109; *Garrison v. Clark*, 11 Ind. 369.

But we think, upon the facts stated by the appellants, the appellee took a fee. The proviso to the twenty-fourth section of our descent law is as follows: "Provided, That if a man marry a second or other subsequent wife, and has, by her, no children, but has children alive, by a previous wife, the land which, at his death, descends to such wife, shall, at her death descend, to his children." 1 R. S. 1876, p. 412.

That, under this proviso, the children take from the wife, not from the husband, what she took from the husband, would seem to be as clear as language can make it. If, therefore, the children take from her, at her death, a fee, she must have taken from the husband, at his death, no less than a fee. The children could take no more from her, at her death, than descended to her from her husband at his death. But while she takes from the husband a fee, she takes it by the statute, to be transmitted from her, at her death, to the children of her husband. The statute makes

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the children of the husband the forced heirs of his surviving widow, whose right of inheritance, like that of a forced heir under the civil law, can not be defeated.

This view of the case gives to the wife a fee, and is consistent with the plain, unambiguous language of the statute. The judgment of the court in the partition proceedings is not only in agreement with the allegations of the complaint, but does not, in any degree, enlarge or change the title of the appellee to the land parted to her. It has been held by this court at the present term, in the case of *Avery v. Akins*, 74 Ind. 283, quite analogous to this, that a judgment in partition does not, ordinarily or necessarily, vest in the co-tenants a new title, but that each has the title he had before. The court quotes approvingly from *Wade v. Deray*, 50 Cal. 376, as follows: "It was held to be 'well settled, that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title. After the partition, each had precisely the same title which he had before; but that which before was a joint possession was converted into a several one.'"

We are unable to discover any error apparent upon the face of said proceedings in partition. And, while we do not decide the question, we are unable to see what advantage can accrue to the appellee by the proceedings in partition, except to hold in severalty the possession of that portion of the land assigned to her during her life.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

Wallis v. Johnson School Township.

No. 9366.

WALLIS v. JOHNSON SCHOOL TOWNSHIP.

TOWNSHIP TRUSTEE.—Promissory Note.—Corporation.—Contract.—Where a promissory note, set forth in the complaint in an action thereon against a school township, appears upon its face to be the note of the corporation, that is, it is signed by the township trustee, as trustee, is payable out of the township funds, the consideration moved to the township, and it appears the note was intended to impose an obligation upon the township, the contract should be regarded as that of the corporation, and not that of the officer whose name is signed to it.

SAME.—Authority to Borrow Money.—School Law.—Statute Construed.—Case Distinguished.—Under the provisions of the school law, 1 R. S. 1876, p. 778, a township trustee has no authority to borrow money for the use of the school township. *Bicknell v. Widner School Township*, 73 Ind. 501, distinguished.

SAME.—Promissory Note.—Complaint.—A township trustee has no authority to borrow money for the use of his school township, but where money is thus borrowed, and actually and rightfully expended for the benefit of the school corporation, it is liable therefor; and a complaint in an action on a promissory note executed by a township trustee for money so borrowed, which fails to allege that the money was expended for the benefit of the school corporation, is insufficient.

CORPORATIONS.—Right to Borrow Money.—As a general rule, a corporation, either public or private, has an implied power to borrow money for objects expressly authorized by the statute by which it was created and endowed with corporate powers and privileges, but, if such power is expressly or by implication denied by such statute, then no such power exists.

From the Gibson Circuit Court.

J. E. McCullough and L. C. Embree, for appellant.
C. A. Buskirk, for appellee.

ELLIOTT, J.—The questions which require our consideration arise upon the error alleged upon the ruling sustaining appellee's demurrer to the third paragraph of appellant's complaint.

The paragraph under mention alleges that the trustee of Johnson township represented to the appellant that he was in need of money for the purpose of purchasing fuel to be used in the school houses of the township, and for the payment of salaries due to teachers; that the trustee also rep-

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75	368
147	235
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153	284
75	368
162	206
162	208

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resented that there was no money belonging to the school funds in his hands, with which to pay teachers or buy fuel; that the trustee asked of the appellant a loan for the said township for the purpose of obtaining money to pay for fuel and to discharge the indebtedness of the school township to the teachers; that the appellant did lend to said township five hundred dollars, and received from the said trustee a promissory note of the township, of which the following is a copy:

"\$500.

JAN'Y 6th, 1879.

"June 20th after date I promise to pay to the order of James Wallis five hundred dollars, to be paid out of the township funds, and five per cent. attorney's fees, negotiable and payable at June 20th, 1879, without any relief whatever from valuation or appraisement laws, for value received, with interest at ten per cent. per annum from date, and ten per cent. per annum after maturity until paid.

"FRED. K. MONROE,

"Trustee of Johnson Tp."

It is not, however, alleged that the township did not have funds in the trustee's hands with which to pay teachers and buy fuel, nor is it alleged that the money obtained by the trustee from appellant was used in paying for fuel, or in discharge of the indebtedness to teachers.

It is a familiar rule, that a corporation having authority to incur an indebtedness may evidence such indebtedness by a promissory note, bill of exchange, or in any other form usually adopted by natural persons in like cases, unless the charter or statute contains some provision to the contrary. Under this general and settled rule, a school corporation, having power to create an indebtedness, would have, as a necessary incident to the principal power, the right to evidence such indebtedness by any of the usual forms of evidences of indebtedness. This court has expressly held that a promissory note may be properly executed for a debt which

Wallis v. Johnson School Township.

the corporate officers have authority to incur. *School Township of Monticello v. Kendall*, 72 Ind. 91; *Sheffield School Township v. Andress*, 56 Ind. 157.

The note set forth in the complaint appears, upon its face, to be the promissory note of the township. Taking the provision, "to be paid out of the township funds," found in the body of the instrument, in conjunction with the descriptive words annexed to Monroe's name, the contract may fairly be deemed to be that of the township, and not the individual undertaking of Frederick K. Monroe. Where it appears that the consideration moved to the township, and also further appears, from the whole instrument, that it was intended to impose an obligation upon the township, there can be no doubt that the contract should be regarded as that of the corporation, and not as that of the officer whose name is signed to it. *McKenzie v. The Board, etc.*, 72 Ind. 189; *Sheffield School Township v. Andress, supra*.

The complaint does not bring the case within *Bicknell v. Widner School Township*, 73 Ind. 501, for it does not show that the money obtained from the appellant was expended for the benefit of the school corporation. In that case it was held, not that the township trustee had power to borrow money for the school township, but that, where the money borrowed was actually used in paying for a school house, the township was liable, as "for money had and received, which was applied to the lawful use of the township." We have no doubt that, where the money obtained by the trustee is actually and rightfully expended for the township, and so expended as to yield the township the full benefit, there is a liability.

In this case, we find facing us this question: Has the township trustee authority to borrow money for the school township? In *Sheffield School Township v. Andress, supra*, it was held that, where a township trustee had actually incurred a debt which he had authority to incur, he might rightfully execute the note of the township in payment, but

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that case is by no means authority for appellant's position, that the trustee has authority to borrow money. Nor does the case of *Harney v. Wooden*, 30 Ind. 178, lend the appellant's argument much support, for holding, as that case does, that the trustees may employ teachers in anticipation of the actual collection of taxes, is very far from deciding that money may be borrowed by the trustee. To employ teachers, or to build school houses, and create a liability against a school township therefor, is essentially different from obtaining loans upon the faith of the township's liability to repay.

It is a well settled general rule, that corporations, either public or private, have an implied power to borrow money for objects expressly authorized by the statute by which they were created and endowed with corporate powers and privileges. While the general rule is as stated, it is nevertheless true that, if the authority to borrow money is expressly or by implication denied by the statute which created the corporation, then no such power exists. This conclusion follows from the broad general rule, everywhere recognized, that corporations possess only such powers as the statute, in express words, or by necessary implication, confers. We are, therefore, to look to the statute which created the school corporations of our State, and determine whether the power to borrow money is expressly or impliedly conferred.

There is no express authority to borrow money delegated to the school officers; this much is clear. It is also clear that the school officers are not expressly authorized to create any indebtedness at all, although, as appears from the cases heretofore cited, the implied power to create an indebtedness for property purchased does exist.

Section 4 of the school law declares that each civil township shall constitute a municipal corporation for school purposes, and confides the management and control of the affairs of the school corporation to the township trustee.

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Section 7 provides, *inter alia*, that the trustee shall receive and pay out the special school revenue and also the revenue for tuition appropriated to his township, and shall pay out the same for the purposes for which such revenues were collected and apportioned.

Section 10 in express words places the trustee in charge of all the educational affairs of the township, and empowers him to employ teachers, and to build and furnish school houses.

These provisions do undoubtedly confer broad and comprehensive powers upon township trustees, and were there no restrictive provisions we should be compelled to hold that, with this broad grant of express powers, there was coupled the incidental one of borrowing money. We think, however, that there are restrictive provisions which, fairly construed, must be held to deny the authority to negotiate loans. In section 6 it is provided that the county auditor, in fixing the penalty of the bond of trustees, "shall see to their sufficiency to secure the school revenues which may come into their hands." There is here a clear implication that the only money which a trustee can officially receive is that yielded by the school revenues. Money obtained by borrowing cannot be said to be school revenue. If an action were brought upon the trustee's bond, and the only breach shown should be the misappropriation of money obtained by borrowing it, it is clear that the action would fail, for the reason that the penalty of the bond extends only to money received from the school revenues. The sources from which the school revenues are derived are created and defined by law, and it is from these sources only that the trustee has a right to secure money for school purposes. Again, section 7 requires that the trustee shall make an annual report, in which he must show, first, the amount of special school revenue, and of school revenue for tuition, on hand at the commencement of the year then ending; second, the amount of each kind of revenue received within the year, giving the

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amount of tuition revenue received at each semi-annual apportionment thereof; third, the amount of each kind of revenue paid out within the year; fourth, the amount of each kind of revenue on hand. The sources from which the trustees are to obtain funds are here clearly defined, and the only sources from which the money can be rightfully received are the school revenues. There is no provision for reporting, or accounting for, borrowed money, or for accounting for money drawn from any other source than the school revenue. So, in section 8, it is provided that the trustee shall keep a record, including "accounts of all receipts and expenditures of school revenue," distinguishing between the special school revenue and the tuition revenue. Here again we have expressed the intention manifested in the sections before referred to, that the trustees shall obtain money for school purposes from the school revenues, and from no other source.

Section 21 requires the trustee to make a financial report to the county superintendent, and requires that he shall report and account for money received from the school revenues.

Section 22 imposes a penalty for a failure to make the report as prescribed in sections 7 and 21; and as the only receipts which either of these sections requires the trustee to report are such as he acquires from the school revenues, it is plain that no penalty attaches to a failure to give any account of money borrowed. The reason there is no such penalty manifestly is, that the statute does not confer authority to negotiate loans. As no authority is conferred to procure money by making loans, there was no necessity for requiring an account of money so procured, and no reason for affixing a penalty for a failure to account for and report it; whereas, if the Legislature had intended to confer authority to borrow money, it is obvious that a report of it would have been required and a penalty affixed for a failure to make the proper accounting.

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Section 2 provides the source from which the tuition fund flows, and section 12 provides how the special fund shall be created. There is nothing in the statute from first to last, indicating that a township trustee can rightfully obtain money from any other source than the school revenues. There is a plain and unmistakable purpose on the part of the Legislature to confine the trustee to the funds expressly provided, and not permit him to go out into the business world as a borrower. There is great wisdom in confining the expenditure of money to that supplied through the channels defined by statute, for if it be once conceded that the right to acquire and expend money not thus derived exists, then there is no limitation or restriction save only that it be borrowed for authorized corporate purposes. We can not think that it was ever intended that township trustees should borrow money without other limitation or restriction than that it should be for authorized and legitimate school purposes. We are strengthened in our conclusion by reference to statutes conferring power to borrow money upon city and town councils, and upon county officers; for in all such cases the authority is always hedged and guarded by careful and salutary restrictions and limitations. Granted the authority to borrow money, the right to determine when and how much shall be borrowed must be left to the unrestricted discretion of the trustee. This, we are confident, is a result which the Legislature never intended should follow from the grant of power to the trustee of the township.

The school corporations of our State are peculiar ones. The township trustee is clothed with almost autocratic power in all school matters; the voters and taxpayers of the township have but little, if indeed any, voice or part in the control of the details of educational affairs. So far as actual authority is concerned, the trustee is the corporation, although in contemplation of law it is otherwise. It is, there-

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fore, all the more important that to the great powers with which he is expressly vested should not be added the dangerous one of the almost unrestricted right to borrow money.

Analogies drawn from rules applied to money corporations fail to be of force when applied to the school corporations of Indiana, for the resemblance which gives force to analogy is wanting. School corporations are not created for the purpose of acquiring property, but for the purpose of furnishing the children of the State with the means of education. They are not organized for the purpose of obtaining funds when and how the officers may elect, but for the purpose of receiving the money expressly provided by law, and of disbursing it for the purposes and in the manner the law directs. The money is provided ; the officers have but to reach out and take it from the appointed depositaries ; they have no right to attempt to secure money from any other place. The money is supplied to them, and they must take it as supplied, and not attempt to devise or create other sources of supply. The school authorities are not bound to furnish educational facilities beyond those which the funds, devoted by law to that purpose, will yield. It is not for them to burden the school township with debt by borrowing money. Their duty is fully performed and their power completely exhausted when they have properly expended all money derived from the school revenues.

We are without a brief from the appellee, and it may be that we have overlooked important considerations which ought to be stated in support of the judgment appealed from.

Judgment affirmed, at the costs of the appellant.

Early et al. v. Hamilton et al.

No. 8128.

EARLY ET AL. V. HAMILTON ET AL.

HIGHWAY.—*Pleading.*—*Remonstrance.*—A remonstrance or objections filed to the vacation of a highway, which fails to show that any of the remonstrants were freeholders of the county, or that they resided along the highway proposed to be vacated, was properly struck out on motion.

PRACTICE.—*General Finding.*—*Facts Proved.*—A general finding for the plaintiff is a finding that every fact necessary to a recovery by him is proved.

SAME.—*New Trial.*—*Record.*—*Supreme Court.*—No question is presented to the Supreme Court by the ruling on the motion for a new trial, where neither the evidence nor the instructions, nor any decision made by the court during the trial, are in the record.

From the Wabash Circuit Court.

M. H. Kidd, C. Cowgill, A. B. Shiveley and C. E. Cowgill, for appellants.

A. Taylor, for appellees.

NEWCOMB, C.—The appellees, sixteen in number, petitioned the board of commissioners, at its December term, 1877, to vacate a part of a public highway, running exclusively through the lands of the petitioner, Samuel Hamilton, on the ground that said portion of said highway was no longer of public utility. Viewers were appointed, who reported in favor of granting the prayer of the petition, and that the part of the highway proposed to be vacated was not of public utility.

At this point the appellants, fifty-one in number, appeared and filed a paper, which they termed an answer and remonstrance. In this they set up a prior adjudication, at the September term, 1877, of said board, in which reviewers had reported adversely to an identically similar petition, by a part of the same petitioners, and that said highway was of public utility. It was further averred that said adjudication was in full force and unreversed; and there was also an allegation that the vacation prayed for in the last petition

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would not be of public utility. The board thereupon refused to appoint reviewers, and dismissed the petition on the ground that the same matter had been determined adversely to the prayer of the petition, at the preceding September term. The petitioners appealed to the circuit court, where, on their motion, the answer and remonstrance filed before the commissioners was struck out, to which the appellees excepted, and incorporated said answer in a bill of exceptions. After the answer was so disposed of, there was a jury trial, resulting in the following verdict :

"We, the jury, find for the plaintiffs, and that the vacation of said road in controversy would be of public utility.

"BENJ. MCCLURE, Foreman."

Motions for a *venire de novo*, for a new trial, and in arrest of judgment were severally overruled, and judgment was entered in accordance with the verdict. The errors assigned are :

1. That the court erred in sustaining the motion to strike out the answer and remonstrance of the appellants ;
2. That the court erred in overruling the motion of appellants for a *venire de novo* ;
3. In overruling the motion for a new trial.

The record does not disclose the ground on which the court struck out the pleading called an answer and remonstrance ; but a valid reason for the action of the court is found in the fact that it was not stated in said pleading that the parties who filed it were freeholders, or even residents of Wabash county. Section 23 of the highway act, 1 R. S. 1876, p. 533, provides that, "If any one or more freeholders residing in such county, along such proposed highway, vacation or change, shall object to the same at any time before final action thereon, as not being of public utility, other viewers may be appointed," etc.

The answer failed to allege that any of the remonstrants were freeholders of the county, or that they resided along said highway ; therefore, it did not appear that they were entitled to object, and their answer was properly struck out.

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On the second assignment of error, the appellants argue that the verdict is imperfect and insufficient, because it did not find specially that all the steps required by the statute, antecedent to a hearing, such as the publication of notice, etc., had been taken. There is nothing in this objection. A general finding for the plaintiff is a finding that every fact necessary to a recovery by him has been proved.

No question is presented by the ruling on the motion for a new trial, as neither the evidence, nor the instructions, nor any decision made by the court during the trial is in the record.

No exception was taken to the overruling of the motion in arrest of judgment, nor is it assigned for error. Neither is there any assignment of error calling in question the sufficiency of the petition.

We find no error in the proceedings of the circuit court, and its judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and it is hereby affirmed, at the costs of the appellants.

No. 7946.

THE PENNSYLVANIA COMPANY *v.* TRIMBLE ET AL.

APPEAL.—*Amount in Controversy.*—*Dismissal.*—Appeals to the Supreme Court from judgments in actions originating before justices of the peace, where the amount in controversy is less than fifty dollars, will be dismissed.

From the Allen Circuit Court.

J. Brackenridge, — Carey and F. T. Zollars, for appellant.

J. E. Graham and M. V. B. Gotshall, for appellees.

Lawless et al. v. Harrington et al.

ELLIOTT, J.—This action was instituted before a justice of the peace, and a judgment recovered by the justice against appellant for forty-five dollars. From this judgment appellant appealed to the circuit court, and in that court a judgment was recovered against appellant for the same sum as that obtained by appellee in the justice's court. This judgment was rendered on the 27th day of May, 1878, and under the provisions of the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59, this appeal must be dismissed, for the reason that the amount in controversy is less than fifty dollars. *Halleck v. Weller*, 72 Ind. 342; *Sprinkle v. Toney*, 73 Ind. 592; *Parsley v. Eskew*, 73 Ind. 558.

Appeal dismissed, at costs of appellant.

No. 7850.

LAWLESS ET AL. v. HARRINGTON ET AL.**PRACTICE.—*Complaint.—Overruling Motion to Strike Out.—Supreme Court.***

—The overruling of a motion to strike out part of a complaint can present no available error on appeal to the Supreme Court.

SAME.—*Bill of Exceptions.—Change of Venue.*—Where motions for a change of venue, and for leave to file answers, are overruled, the affidavit in support of such change and the answers proposed to be filed must be shown by the bill of exceptions, to present the questions to the Supreme Court.

SAME.—*Extension of Time.*—Where the entire showing for and against a motion for an extension of time to file bills of exceptions is not in the record, the Supreme Court will not reverse the ruling thereon.

SAME.—*Excluding Answer.*—In an action originating before a justice of the peace, it is not error to exclude the filing of an answer setting up a defence which is provable without plea.

SAME.—*Assignment of Error.—Must be Specific.*—Assignments of error to be available must be specific, and therefore an assignment to the effect that the action of the judge was oppressive, illegal and in violation of all law, and the whole judgment wrong and oppressive, is too general.

From the Marion Circuit Court.

Lawless *et al.* v. Harrington *et al.*

J. S. Reid, for appellants.

H. W. Harrington and A. G. Howe, for appellees.

Woods, J.—Action by the appellees, against the appellants, upon an injunction bond, commenced before a justice of the peace, and taken thence, by appeal, to the circuit court.

Error is assigned upon the overruling of the appellants' respective motions, for a new trial, for a change of venue, to strike out parts of the complaint, for leave to file an answer, and for an extension of time to file bills of exceptions, upon the overruling of the demurrer to the complaint, and that the judgment is erroneous, excessive and oppressive.

The refusal of the court to strike out part of the complaint can present no available error. *Hay v. The State, ex rel.*, 58 Ind. 337; *The Baltimore, etc., R. W. Co. v. Pixley*, 61 Ind. 22; *Trammel v. Chipman*, 74 Ind. 474.

The only ground of demurrer urged against the complaint is, that the transcript from the justice of the peace, and the record in this court, show no copy of the bond filed with the complaint. The objection is not true in point of fact. The complaint contains an averment that a copy of the bond is filed therewith, and immediately following the complaint in the transcript is set forth a copy of the bond.

There is no bill of exceptions showing the application for a change of venue, nor the answers which it was proposed to file. There is, therefore, no question saved in reference to these rulings. *McDaniel v. Mattingly*, 72 Ind. 349; *Douglass v. The State*, 72 Ind. 385.

The case having been commenced before a justice of the peace, all matters of defence were, provable without plea, except the statute of limitations, set-off, and matter in abatement. The answers set forth in the motion for a new trial, as those which the court excluded, presented nothing within the exceptions. The appellant therefore suffered no harm in this respect. *The Cincinnati, etc., R. R. Co. v. Ridge*, 54 Ind. 39

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There is in the record a bill of exceptions, showing the motion of the appellants, and the affidavits filed in support thereof, for an extension of the time to file bills of exceptions, but the counter showing, which the bill states was filed, is not given. If, therefore, it were conceded that the court had power, on a proper showing, to have extended the time, it is impossible to say that there was error in overruling the request, because the entire showing is not before us.

The evidence not being in the record, we can not decide whether the judgment is excessive or that any improper element of damages was allowed.

The assignment, to the effect that the action of the judge was oppressive, illegal, and in violation of all law, and the whole judgment wrong and oppressive, is too general to present any question. Assignments of error, to be available, must be specific.

The judgment is affirmed, with costs.

No. 7679.

WARD ET AL. v. HAGGARD.

PROMISSORY NOTE.—Contract of Assignor.—The contract of an assignor of a promissory note, negotiable under the statute, but not governed by the law merchant, is a warranty that the maker is liable on the note and able to pay it.

JUDGMENT.—Merger.—A cause of action in suit is merged in the judgment rendered thereon.

SAME.—Promissory Note.—After judgment upon a promissory note, it can not be endorsed or assigned.

SAME.—Assignment.—Liability of Endorsers of Note to Assignee of Judgment.—Statute Construed.—The mere assignment of the judgment obtained by an assignee, against the makers, of a promissory note, negotiable under the statute, does not transfer to the assignee of such judgment the cause of action, theretofore existing, against the endorsers, upon

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their endorsement to the assignee of the note on which the judgment was rendered. The cause of action to pursue remote endorsers, under the statute, 1 R. S. 1876, p. 635, is given to the assignee of the note itself, and not to the assignee of the judgment on the note.

From the Tippecanoe Circuit Court.

R. P. Davidson and J. C. Davidson, for appellants.

W. D. Wallace, for appellee.

Hawk, C. J.—In this case the appellants, the defendants below, demurred to the appellee's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court, and to this ruling the appellants excepted. They declined to answer further, and the court rendered judgment against them for the amount found due the appellee on his alleged cause of action, and his costs of suit.

From this judgment this appeal is prosecuted, and the only error assigned here by the appellants is the overruling of their demurrer to appellee's complaint.

In his complaint the appellee alleged, in substance, that, on the 12th day of September, 1871, one Erasmus M. Weaver promised to pay the appellants, who were partners under the firm name of J. H. & W. L. Ward, the sum of two hundred dollars, as evidenced by a certain promissory note, a copy of which was filed with said complaint; that afterward, on the 29th day of January, 1874, for value received, the appellants, as such partners, assigned said note to the defendant Reuben Taylor, in writing endorsed thereon, a copy of which endorsement, with a copy of the note, was also made a part of said complaint; that, on the 17th day of April, 1874, said Taylor instituted a suit on said note against said Erasmus M. Weaver, at the April term, 1874, of the court below; that, on the 12th day of October, 1874, a judgment was rendered by said court on said note, in favor of said Taylor and against said Weaver, for the sum of \$244; that, on the 2d day of November, 1874, the said

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Taylor assigned, in writing, his said judgment on the order book of said court to the appellee ; that, on the 13th day of January, 1875, the appellee caused an execution to be issued on said judgment and delivered to the sheriff of Tippecanoe county, which was afterward returned for an *alias* writ ; that, on the 27th day of September, 1875, an *alias* execution on said judgment was issued to said sheriff, which was by him returned in writing, to the effect that he could find no property in his county whereon to levy said writ, and therefore returned the same, "no money made," January 17th, 1876 ; that said note and judgment were still wholly unpaid, and there was due the appellee, from the defendants the amount of said note, with interest thereon from its maturity ; and that said Erasmus M. Weaver was, at the time the appellants assigned the said note to said Reuben Taylor, and had since been, and then was, wholly and notoriously insolvent ; and that, by means of the premises, the appellee ought to recover of the appellants the amount of said note, with interest and attorney's fees. Wherefore, etc.

It may be conceded, we think, that the said Reuben Taylor, as the assignee of the note by the appellants, might have maintained an action against them upon their assignment, at least before his assignment of his judgment to the appellee, upon the ground of the insolvency of Weaver, as alleged, at and since the appellants' assignment of the note. For, the doctrine is settled by the decisions of this court, that the contract of an assignor of a note, negotiable under our statute, but not governed by the law merchant, is a warranty that the maker is liable on the note and able to pay it. *Howell v. Wilson*, 2 Blackf. 418 ; *Sering v. Findlay*, 7 Ind. 247 ; *Black v. Duncan*, 60 Ind. 522, on p. 532.

Taylor had a cause of action against the appellants, upon their assignment of the note, by reason of the insolvency of the maker of the note at and after the date of their assignment thereof. Taylor obtained a judgment against the

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maker of the note, for the amount due thereon, and subsequently assigned his judgment to the appellee. The question for our decision, in this case, may be thus stated: By his mere assignment of his judgment to the appellee, did Taylor also assign and transfer to such assignee his cause of action, theretofore existing, against the appellants, upon their assignment to him of the note on which the judgment had been rendered? We are of the opinion, that this question ought to and must be answered in the negative. The effect of Taylor's assignment of the judgment to the appellee, under the provisions of the statute authorizing such assignment, was simply to vest the title to such judgment in the assignee thereof, and to enable such assignee to maintain, in his own name, any action on the judgment which the plaintiff therein might have maintained thereon. 2 R. S. 1876, p. 351. In construing the provisions of the statute referred to, in the case of *Reid v. Ross*, 15 Ind. 265, this court said: "The assignment simply transfers the judgment to the assignee, and no liability, as to the solvency of the judgment debtor, attaches, in the absence of fraud or express stipulation. We see no good reason why this transfer does not stand upon the same ground as the transfer of any personal chattel. * * * The settled law of the State, that an assignee of a note, having used due diligence to collect of the maker, may maintain his action against his endorser, has its foundation in express and positive legislation. No such legislation, however, is to be found in reference to the assignment of judgments; and we can not infer that the Legislature intended to place the assignment of judgments and promissory notes upon the same ground, as to the liability of the assignor. In the one case, they have provided for such liability; in the other, they have not."

It has often been decided by this court, that the cause of action in suit is merged in the judgment rendered thereon *Cissna v. Haines*, 18 Ind. 496; *Rawley v. Hooker*, 21 Ind.

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144; *Ault v. Zehering*, 38 Ind. 429; *Gould v. Hayden*, 63 Ind. 443. Weaver's note, therefore, was merged in the judgment which Taylor recovered thereon. After judgment the note could not be endorsed or assigned. *Daniel Neg. Instruments*, sec. 728; *Wooten v. Maultsby*, 69 N. C. 462. If the note, after judgment, could not be directly assigned by written indorsement thereon, as surely it could not be, *a fortiori*, as it seems to us, it could not be assigned indirectly, by the mere assignment of the judgment in which it was merged, so that such assignee would have an action against the appellants, as remote endorsers of the note. We are of the opinion that the appellee, upon the facts stated in his complaint, was not and can not be regarded as the assignee of the note; and, under the statute, the cause of action is given, in such a case, to the assignee of the note itself, and not to the assignee of a judgment on the note. The cause of action, if any exists, has its origin in, and is governed by, the provisions of "An act concerning promissory notes," etc., approved March 11th, 1861; and this statute, we think, fails to provide for any such case as is made by the appellee's complaint. 1 R. S. 1876, p. 635. The statute does not in terms apply to judgments, but it is limited to instruments in writing, thereby made negotiable, and the rights and liabilities of the parties to such instruments. We can not extend the provisions of this statute, by construction, so that it would provide that the assignee of a judgment against the maker of a note, having used due diligence in the premises, etc., should have an action against any remote endorser of the note before it was merged in the judgment. We know of no law, statutory or otherwise, in force in this State, which gave the appellee, as the assignee of the judgment on Weaver's note, an action against the appellants, as the remote endorsers of such note before its merger in the judgment.

Our conclusion is, that the facts stated in the complaint
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were not sufficient to constitute a cause of action in favor of the appellee and against the appellants; and that, for this reason, the court erred in overruling the demurrer to such complaint.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

No. 7745.

TAYLOR, ASSIGNEE, v. RUSSELL, ADMINISTRATOR.

DECEASED'S ESTATES.—Principal and Surety.—Replevin Bail.—Where one becomes replevin bail upon a judgment rendered against the principal debtors, and against the estate of a deceased surety as such, at the request of the principal debtors, he must look to them alone for reimbursement for the payment of the judgment, and can not enforce a claim for payment against the estate of the surety.

SAME.—Judgment Against Administrator not Repleviable.—Such judgment against an administrator is not repleviable, and the result of the entry of replevin bail is the same as if objection had been made under section 430, 2 R. S. 1876, p. 205.

SAME.—Query.—Filing Claim.—Limitation.—Should not such a claim be filed within one year from the date of the first appointment of an executor or administrator, and notice thereof?

From the Hendricks Circuit Court.

T. J. Cofer and N. M. Taylor, for appellant.

C. C. Nave, for appellee.

WOODS, J.—The appellee, as administrator of the estate of Samuel A. Verbriche, filed a report for final settlement, showing that he had disbursed on claims, and to the widow of the deceased, a sum in excess of all moneys which had

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come to his hands, both from the real and the personal estate. The appellant, as assignee in bankruptcy of James Nichols, filed an exception to the report, averring, in substance, that he is assignee of the estate of said Nichols, a duly adjudged bankrupt, and that pursuant to and by authority of a certain order and written permit of the District Court of the United States for the District of Indiana, a copy of which is given, he excepts to said report for the following reasons, to wit: That as such assignee he has a valid preferred claim against said estate in the sum of three hundred and sixty-five dollars; that said Verbriche, in his lifetime, became surety upon a note executed by Jules A. Viquesney and George W. Robinson, as principals, to Valentine Lingenfelter, in the sum of three hundred dollars; that after the death of said Verbriche, and on the 7th day of October, 1876, judgment was rendered on said note in the sum of three hundred and twenty-one dollars against said Viquesney and Robinson as principals, and said Robinson C. Russell, administrator of the estate of said Verbriche, as surety; that afterwards, on the 15th day of November, 1876, said James Nichols became replevin bail for the stay of execution on said judgment; that afterwards, to wit, December 3d, 1877, said Nichols, bankrupt, as such replevin bail, was forced to, and did, pay off and satisfy said judgment, interest and costs, in the sum of three hundred and fifty dollars; that said Viquesney is now, and for the last twelve months has been, in bankruptcy, and said George W. Robinson has left the State of Indiana, leaving no property with which to satisfy said claim; that the estate of said Verbriche is solvent, and there are assets thereof with which to satisfy said claim, which is due and unpaid, but the administrator has failed and refused, and still refuses, to pay the same. Wherefore said assignee asks that said report be not approved, and that the administrator be ordered to pay said claim out of the assets of said estate, and that the court allow full relief in the premises.

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To this complaint, or statement of exception, the court sustained a demurrer and gave judgment for the appellee. The appellant saved an exception to the ruling, and has properly assigned error thereon. The proceedings in the court below were had in October, 1878.

It may be observed that the appellant's claim against the estate was probably one which under the law is required to be filed within one year from the date of the first appointment of an executor or administrator of the estate and notice thereof; yet it is not shown that he had ever filed his claim, nor but that the time had passed within which he was allowed to file it. But, without deciding anything upon this point, we pass to other considerations, upon which we conclude that the appellant had no valid claim against Verbriche's estate.

The allegation in this respect is that James Nichols became replevin bail upon the judgment which had been rendered against Viquesney and Robinson, as principal debtors, and the estate of Verbriche, as surety; but at whose request he became bail, or whether at the request of anybody, is not alleged. The provision of the code, section 420, is that any person, against whom a judgment has been rendered for the recovery of money or property, "may, by procuring one or more sufficient freehold sureties, to enter into a recognizance," etc., have a stay of execution. But there is no authority for any one volunteering to become replevin bail. By the 430th section it is provided that if one of two or more judgment defendants be surety for any other or others in the contract on which the judgment is founded and object to a stay, no stay can be allowed unless the bail undertake specially to pay the judgment, if it can not be levied of the principal defendant. The appellant's complaint does not show but that, in becoming bail, Nichols was a volunteer, nor that he did not bind himself specially to pay the judgment if not levied of the principal defendants. It is manifest that a stay

Taylor, Assignee, v. Russell, Administrator.

of execution can be of no direct advantage to an estate against which a judgment has been rendered, and in such cases as this, where the judgment is against the principal debtor as such, and against the estate as surety only, the entry of replevin bail is likely to result in harm to the estate, if he who enters into the recognizance can have recourse upon the estate to recover any sum which he may be forced to pay. If such be the law, it would seem to be the clear duty of an administrator or executor in any such case to interpose an objection to a stay, and, in default of so doing, he might be liable on his bond for any injury suffered by the estate. It was held, however, in *Egbert v. The State*, 4 Ind. 399, that a judgment against an administrator was not repleviable.

Citing the statutory provisions in relation to the subject, the court said: "These are all the provisions authorizing replevin bail, and they show plainly enough that the judgments made repleviable are those rendered against defendants in their personal capacities, which they are bound to pay absolutely out of their own property. A judgment against an administrator, as such, to be paid out of the estate of the deceased, is not substantially, but merely nominally, a judgment against him. It is a judgment against the estate upon which he administers, and is never to be paid unless the estate is able to pay it. The administrator is not, by such a judgment, rendered absolutely liable for its payment. Such a judgment is not within the statutes authorizing replevin bail." The statutory provisions referred to are substantially the same as those in the code of 1852, which govern this case. The only difference in the facts worthy to be noted is that in the case referred to the judgment was against the administrator alone; while in this case it is against living parties in their personal capacities, as well as against the administrator in his trust capacity. But there is no difficulty in the application of the rule. The judgment defendants, against whom an execution may issue, may, if they choose, procure the entry of replevin bail, but as the entry works no benefit

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to the estate represented by the administrator, who is also defendant, and under the law is not applicable to the judgment against the administrator, the result is the same as if an objection to a stay had been made by the administrator, and he who goes bail in such case can have no recourse on the estate.

What the effect would be, if the estate were not in the position of a surety, as in this case, it is not necessary to decide, nor to consider. It may be suggested, however, that the direct result would be the same; but indirectly the replevin bail, who had been compelled to pay the judgment, might have partial relief against the estate. The estate being liable to its co-defendants for a contributive share of the debt, in case they had paid it, he who, at the request of the co-defendants, became replevin bail and was compelled to pay the judgment, might be subrogated to the right to enforce the contribution. And so, if the estate were the principal debtor, and the replevin bail were entered on behalf of the surety in the judgment, the bail, who had paid the judgment, might be allowed to enforce the claim against the estate, for the entire amount which he had paid. But the appellant has no such right. He became replevin bail for the principal debtors, and at their request, if at the procurement of anybody who had a right to obtain bail, and to them alone he must look for reimbursement.

The judgment is affirmed with costs.

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126	150
127	255
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75	390
155	630

No. 7730.

LEWIS v. BORTSFIELD ET AL.

PARTITION. — *Pleading.* — *Complaint.* — *Practice.* — *Finding.* — *Supreme Court.* — Objections to a complaint for partition of real estate for failing to state specifically the title of the parties to the land, and that they held the same as tenants in common, made for the first time in

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the Supreme Court, are not available to reverse the judgment below, where the finding of the court was that the parties were the owners in fee and tenants in common of such land.

SAME.—*Defects Cured by Evidence and Finding.*—Such defects are of that character which might have been, and doubtless were, supplied by the evidence, and cured by the finding of the court.

PRACTICE.—*Pleading.*—*Cross Complaint.*—*Issue.*—After trial without objection, although no answer was filed to a cross complaint, it will be regarded on appeal as if an answer in denial had been filed.

SAME.—*Cross Complaint.*—*Appearance.*—*Service.*—*Default.*—*Judgment.*—It is only where one of two or more defendants, after personal service, makes default in the original action, and another defendant files a cross complaint, setting up new matter not apparent in the original complaint, that the defaulting defendant must be served with process, issued on such cross complaint, before any judgment by default can be rendered against him thereon.

From the Delaware Circuit Court.

W. March, for appellant.

J. N. Templar and R. S. Gregory, for appellees.

Hawk, C. J.—This was a suit by the appellee Bortsfield, against the appellant, Lewis, and Susannah and William Goings, for the partition of certain real estate, in Delaware county. All the defendants jointly answered Bortsfield's complaint by a general denial; and the appellant, in a second paragraph, alleged that he was the separate and individual owner in fee of all the real estate in controversy, to which paragraph Bortsfield replied by a general denial. The defendant Susannah Goings separately filed a cross complaint, alleging that she was the owner in fee of an undivided interest in the real estate, and praying for partition, etc., to which cross complaint the appellee Bortsfield answered by a general denial.

The cause was tried by the court, and a finding was made that the appellant, Lewis, was the owner in fee simple of the undivided five-sevenths, and that the appellee Bortsfield and said Susannah Goings were each the owner in fee of an undivided one-seventh, and tenants in common of the real estate in controversy; and that the appellee Bortsfield

Lewis v. Bortsfield et al.

and said Susannah Goings were each entitled to partition and to have their respective interests in the real estate set off to each of them in severalty. Thereupon, an interlocutory judgment was rendered, awarding partition and appointing commissioners to make and report the same, in accordance with the finding of the court. When these commissioners made their report of partition, the appellant filed exceptions thereto, which were sustained by the court and the report set aside; and the court then appointed other commissioners to make and report such partition, upon and in pursuance of the previous finding of the court. Afterwards, these commissioners made and acknowledged, in open court, a written report of the partition made by them; and, no good cause having been shown against said report, it was confirmed by the court, and final judgment of partition was rendered thereon and in accordance therewith.

In this court, the appellant has assigned, as error, that the petition or complaint of the appellee Bortsfield does not state facts sufficient to constitute a cause of action. In his complaint, the said Bortsfield alleged, in substance, that he and the said Susannah Goings were each the owner of the undivided one-seventh part, and that the appellant was the owner of the undivided five-sevenths part of the real estate, particularly described, in Delaware county; "and plaintiff asks judgment for partition of said realty, and that his said interest therein be set off to him by commissioners to be appointed by said court."

This complaint must be regarded, we think, as a model of brevity, but not of good pleading. In discussing the alleged insufficiency of the complaint, the appellant's learned counsel says: "The second section of the act concerning partition requires the petitioner to state, in his petition, the titles of the parties and their rights. This petition does not state either of their titles, and only in part their rights. It does not state whether the parties hold as ten-

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ants in common, or joint tenants, or what estate they have in the land."

This is the entire argument of the appellant's counsel on the question of the supposed insufficiency of the complaint or petition. But, if it be conceded that the complaint in this case is defective in the particulars suggested by counsel, that it should have been alleged therein that the parties were the owners in fee simple of their respective interests in the land, and that they held the same as tenants in common, yet we are of the opinion that these defects, on objection thereto for the first time in this court, can not be made available for the reversal of the judgment below. If the appellant had moved the circuit court to require the plaintiff to make his complaint more specific in the particulars mentioned, or had demurred thereto for the want of sufficient facts, it might, perhaps, have been error to have overruled such motion or demurrer. But this point is not before us, and is not decided. The defects complained of by counsel were of that character which might have been, and doubtless were, in this case, supplied by the evidence and cured by the finding of the court, as the trier of the facts. For the court found, as already stated, that the parties were the owners, in fee simple, of their respective interests in the real estate, and that they held the same as tenants in common. *Donellan v. Hardy*, 57 Ind. 393; *Smith v. Freeman*, 71 Ind. 85; *Field v. Burton*, 71 Ind. 380; *The Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294.

Our conclusion is, that the objections now urged by the appellant's counsel, to the sufficiency of the complaint, for the first time in this court, come too late, and must be regarded as cured by the finding of the trial court.

The appellant's counsel further says, in his brief of this cause: "Again, no issue was made upon the cross complaint of Susannah Goings, by Lewis. There was no appearance by Lewis to the cross complaint. It was tried

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without an appearance or issue.' This is all that is said by counsel on either of the points suggested in this part of his argument. It is clear that appellant's failure to answer, or join issue upon, the cross complaint of Susannah Goings, affords him no ground for the reversal of the judgment below; after trial, without objection on that ground, although no answer was filed to the cross complaint, it will be regarded and held, on appeal, as if an answer in denial had been filed. *Casad v. Holdridge*, 50 Ind. 529; *Purdue v. Stevenson*, 54 Ind. 161; *Bass v. Smith*, 61 Ind. 72.

Nor will the alleged fact, that there was no appearance by appellant to the cross complaint, afford him any ground for the reversal of the judgment. He appeared fully in the action, as shown by the record, both before and after the filing of the cross complaint, and was bound, therefore, to take notice of the cross complaint, without the issue and service of process thereon. It is only where one of two or more defendants, after personal service, makes default in the original action, and another defendant files a cross complaint, setting up new matter not apparent on the face of the original complaint, that the defaulting defendant must be served with process issued on such cross complaint, before any judgment by default can be taken or rendered against him on such cross complaint. *Fletcher v. Holmes*, 25 Ind. 458; *Joyce v. Whitney*, 57 Ind. 550; *The State, ex rel. Kolb, v. Ennis*, 74 Ind. 17.

Besides, the cross complaint of Susannah Goings did not set up any new matter, but alleged substantially the same facts which were stated in the original complaint of the appellee Bortsfield.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

Hayes et al. v. Hayes et al.

No. 7302.

75 395
125 339**HAYES ET AL. v. HAYES ET AL.**

APPEAL.—Effect of.—Judgment.—An appeal to the Supreme Court does not annul a judgment. The utmost effect it can have, when accompanied by the proper auxiliary proceedings, is to stay the enforcement of the judgment appealed from.

DECEDENTS' ESTATES.—Contest of Will.—Special and General Administrators.—Appeal.—After a judgment against the validity of a will, in an action to resist the probate thereof, during the pendency of which action a special administrator was appointed for the decedent's estate, it is proper for the court to appoint a general administrator, although an appeal may have been taken from such judgment.

SAME.—Right of Court to Install Executor.—In such case the court, by the appointment of a general administrator, did not deprive itself of the power to install the rightful executor of the will in office should a judgment of reversal result in a final adjudication declaring the will valid and effectual.

SAME.—Special and General Administrators.—Special administrators are appointed for temporary purposes, and not as permanent representatives of the decedent's estate, and when the condition of affairs which made the appointment of a special administrator necessary has ceased to exist, then the special letters may be supplanted by general letters of administration.

SAME.—Right of Next of Kin to Letters of Administration.—Section 7 of the act for the settlement of decedents' estates. 2 R. S. 1876. p. 492, is mandatory, and where a son of a decedent, eligible and qualified, asks to be appointed administrator of the estate, it is error for the court to refuse the request and confer the trust upon a stranger.

From the Dearborn Circuit Court.

J. Schwartz and O. B. Liddell, for appellants.

S. A. Huff and G. W. Galvin, for appellees.

ELLIOTT, J.—Joseph Hayes died in the year 1875, leaving an instrument purporting to be his last will. The instrument was offered for probate, resistance was made, issues formed, and trial had, resulting in a judgment against the proponents of the supposed will. From this judgment an appeal to this court was taken, bond filed, and supersedeas issued. Soon after the death of Joseph Hayes, and after objection to the probate of his alleged will had been filed, spe-

Hayes et al. v. Hayes et al.

cial administrators were duly appointed. After the judgment declaring the will invalid was entered, and after the appeal to this court and the issuing of the supersedeas, the appellees applied for the appointment of a general administrator of the estate of said Joseph Hayes, and such proceedings were had as resulted in the appointment of Philip L. Matthews. Resistance to such appointment was made by the appellants, and from the judgment granting letters to said Matthews they prosecute this appeal.

The judgment declaring the asserted will of Joseph Hayes to be invalid was not set aside or its force in any wise impaired by the appeal. *Walker v. Heller*, 73 Ind. 46. There was after that judgment, and until reversal, no such will, and consequently there could be no executors. An appeal does not annul a judgment; the utmost effect it can have, even when accompanied by the proper auxiliary proceedings, is to stay the enforcement of the judgment appealed from. There was, therefore, no reason why the court did not have full power to appoint a general administrator at the time letters were granted to Matthews. There was nothing in the condition of affairs making it necessary, or indeed proper, to continue the special administrators in office. Counsel place much stress upon the act of February 26th, 1857, but we find no warrant in it for the conclusion of appellants that the court was bound to continue the special administrators until the final disposition of the appeal. That act does not mean that the special administrators shall continue beyond the termination of the contest. In the present instance, the judgment of the court pronouncing against the will ended the contest, and declared authoritatively that there was no will. When this point was reached, and it was determined that there was no executor because no will, it became not only proper, but necessary, to appoint a general administrator, to whose hands the estate should be finally committed for administration. Special administrators are appointed

Hayes *et al.* v. Hayes *et al.*

for temporary purposes, and not as permanent or regular representatives of the decedent's estate. When the time for the appointment of a regular administrator arrives, or when the condition of affairs which made the appointment of a special administrator necessary has ceased to exist, then the special letters may be supplanted by general letters of administration.

We know that the appellants in the case growing out of the contest of the will were successful on appeal, and obtained a reversal of the judgment rendered in that case. *Hayes v. Burkam*, 67 Ind. 359. But this does not alter the rule of law applicable to the state of things existing when Matthews received general letters of administration. When the letters were granted, the judgment declaring the will invalid was in full force, and there was simply a pending appeal, and nothing more.

It was immaterial whether the administrator in office was a general or special one; the court had as much power to remove the one as the other in case there should be a final judgment sustaining the will. By appointing a general administrator, the court did not strip itself of the power to install the rightful executor in office should a judgment of reversal result in a final adjudication declaring the will to be a valid and effective one. The right to put the executor in office, upon proper demand, is as complete against the general as against the special administrator in such cases as the present.

Whether the appellants could have enjoined the administrator from proceeding in contravention of the provisions of the will, pending the appeal, is a question we do not feel called upon to decide, for we do not regard it as presented by the record.

It appears from the evidence, and without contradiction, that Ezra G. Hayes, a son of the decedent, possessing all the requisite qualifications and properly eligible in every re-

Begien v. Freeman.

spect, asked to be appointed administrator, and that his petition was denied and the trust conferred upon a stranger. So far as we can ascertain, there was nothing in the evidence tending to show that the son was ineligible, and the appellees have not called our attention to any fact tending to impeach his right to administer upon his father's estate.

Section 7 of the act concerning the settlement of decedents' estates commands, not directs merely, that letters shall be granted to the next of kin, and we can find nothing in the record justifying the action of the court in disregarding this command by denying the kinsman's petition and conferring the trust upon a stranger.

Judgment reversed, at costs of the appellees.

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75	898
128	515
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75	398
159	539

No. 7895.

BEGIEN v. FREEMAN.

DECEDENTS' ESTATES.—Executor or Administrator.—Right to Sue.—Generally, the executor or administrator of a decedent alone can maintain an action for the recovery of a debt due or owing to such decedent at his death.

SAME.—Intestate —No Debts and No Administration.—Heirs May Sue.—Heirs at law of an intestate may sue where such intestate left no debts to be paid, and there was no administration.

SAME.—Widow as Sole Heir —Promissory Note Acquired by Descent.—An intestate's widow, being his sole heir, may sue upon a promissory note payable to him, which came to her by descent.

From the Madison Circuit Court.

J. H. McConnell and *J. W. Sansberry*, for appellant.
H. D. Thompson, for appellee.

Howk, C. J.—This was a suit by the appellee, against the appellant, upon a note and mortgage, executed by the latter

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to one Nolly Walden, since deceased, and inherited by the appellee as the widow and sole heir at law of said decedent. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee for the amount due on the note of principal and interest, and for an attorney's fee. The appellant's motion for a new trial having been overruled, and his exception saved to such ruling, the court rendered judgment on the verdict.

The first error complained of by the appellant is the decision of the circuit court in overruling his demurrer to the appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action. In her complaint, after stating that the appellant had executed the note and mortgage in suit, to Nolly Walden, the appellee further alleged that afterward, on the — day of —, 187—, the said Nolly Walden died, leaving the appellee as his widow and sole heir at law; that there had not been any administration of said decedent's estate; that he had died, leaving no claims or debts outstanding against him or his estate; and that the said note came legally into her hands by descent from her said husband. Upon these allegations, the question for our decision is this: Are these facts sufficient to show a cause of action in the appellee upon the note and mortgage in suit? The general rule is, that the executor or administrator of a decedent alone can maintain an action for the recovery of a debt due or owing to such decedent, at the time of his death. *Ferguson v. Barnes*, 58 Ind. 169.

But, as an exception to this general rule, it has been repeatedly held by this court, that the heirs at law of an intestate may sue for a debt owing to such decedent, at the time of his death, where such decedent left no debts to be paid, and there was no administration of his estate. *Moore v. The Board, etc.*, 59 Ind. 516; *Westerfield v. Spencer*, 61 Ind. 339; *Church v. The Grand Rapids, etc., R. R. Co.*, 70 Ind. 161.

Begien *v.* Freeman.

But it is claimed that the complaint in the case at bar was insufficient on the demurrer thereto, because it was not alleged therein that Nolly Walden had died intestate. It is true, that the complaint does not in terms allege the intestacy of Nolly Walden at the time of his death. It seems to us, however, that the facts averred on this point show, with sufficient clearness and certainty, that, as to the note in suit, Nolly Walden did die intestate, for the appellee alleged that she was the widow and sole heir at law of said decedent, and that the note came legally to her by descent from her said husband. These facts, by necessary implication, entirely exclude the idea of Walden's testacy, at least to the note in suit ; and, in connection with the other facts alleged, they show a *prima facie* title in the appellee to the note, sufficient, we think, to enable her to maintain an action thereon for the recovery of the money. The court did not err in overruling the demurrer to the complaint.

The only other error assigned by the appellant is the decision of the trial court in overruling his motion for a new trial. It is claimed by the appellant's counsel, in argument, that the verdict of the jury was not sustained by sufficient evidence. Our examination of the evidence, as it appears in the record, has led us to the conclusion that this point is not well taken. It is true that the evidence is not very full or satisfactory, but we can not say that it did not fairly tend to sustain the material averments of appellee's complaint. From the facts proven, and the inferences which the jury might have legitimately drawn from such facts, they were fully justified in returning a verdict for the appellee ; and, in such a case, the verdict ought not to be disturbed on the weight of the evidence. Counsel also complain of the action of the court, in refusing to give an instruction at the appellant's request ; but the record shows that the substance of the instruction asked was given the jury by the court of its own motion and in its own language. The court's

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refusal to give the instruction asked for, even if erroneous, was therefore a harmless error and would not authorize the reversal of the judgment.

Finally, it is insisted by appellant's counsel, that the damages assessed by the jury, in their verdict, were excessive in the sum of \$29 over the amount due on the note. But it seems to us, from our computation of the amount due the appellee under the evidence, that the error of the jury, in assessing the damages, was in favor of the appellant and against the appellee. The motion for a new trial was correctly overruled.

The judgment is affirmed, at the appellant's costs.

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No. 7950.

EDWARDS ET AL. v. BEALL, BY NEXT FRIEND.

REAL ESTATE.—Conveyance to Husband and Wife.—Right of Survivor.—

Right of Heir.—A conveyance of land to a woman and her husband to be held by her as her own property, the husband having the possession during his lifetime and possession to return to her if she survive him, vested in her the title in fee subject to his life-estate, if he survived.

SAME.—Deed Construed.—Joint Tenancy not Created.—By the terms of such a deed a joint tenancy by entirties was not vested in the husband and wife.

SAME.—Death of Wife Before Husband.—Descent of Two-thirds to Heir.—Upon the death of the wife before the husband, two-thirds of the estate at once descended to their son and only heir, and was not liable to be assets for the payment of the husband's debts; and the husband became seized in fee of the other one-third.

SAME.—Decree of Sale.—Confirmation.—Mistakes.—Action to Quiet Title by Heir.—A decree of sale of such two-thirds for the payment of such debts, and a decree confirming the sale, were mistakes within the meaning of section 177, 2 R. S. 1876, p. 554, and the infant heir would be entitled to have them annulled and set aside, and his title quieted.

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SAME.—*Deeds of Administrator and Purchaser Annulled.—Partition.*—In such case, the deed of the administrator and the deed of the purchaser to his grantee ought also to be set aside and annulled as to such two-thirds, and partition made.

PRACTICE.—*Infant Plaintiff.*—An action to correct a mistake in a decree, set aside a deed, quiet title and for partition may be commenced by an infant.

SAME.—*Age of Plaintiff.—Complaint.—Answer.*—Unless the age of the plaintiff is stated in the complaint, or in an answer setting it forth, the record does not present the question of his infancy and incapacity to sue.

SAME —Party Demurring Presumed in Court.—Supreme Court.—Where both the judge of the trial court, and the person demurring to a complaint, thought he was a party to the action, the Supreme Court will presume that he was and is properly in court.

CONSTRUCTION.—Deed.—Premises.—Habendum.—In construing the terms of a deed, both the premises and the habendum must be considered. The office of the habendum is to determine what estate or interest is granted. It may often qualify the premises, but may not contradict the estate so granted.

From the Knox Circuit Court.

W. H. De Wolf and S. N. Chambers, for appellants.

H. Burns and J. S. Pritchett, for appellee.

FRANKLIN, C.—This action was brought by appellee against appellants to correct a mistake, to set aside a deed in part, to quiet title, and for partition of a lot in the city of Vincennes. The complaint is in two paragraphs. The first, simply for partition between appellee and appellant Edwards ; the second, setting up the facts in relation to the interest of all the parties. The defendants separately demurred severally to each paragraph of the complaint, for the reason that neither paragraphs contained facts sufficient to constitute a cause of action. The demurrer of Edwards was overruled and the demurrer of Chancellor was sustained as to the first paragraph, and overruled as to the second. Edwards answered in denial, and filed a cross bill, setting up improvements, which he asked to be taken into consideration. Appellee replied by a denial, and rents as an offset to improvements. Demurrer to second paragraph of reply overruled ; and all of which rulings were properly excepted to.

Edwards *et al.* v. Beall, by Next Friend.

Trial by court, and at the request of appellants, the court made a special finding of the facts, with the conclusions of law thereon, which conclusions were excepted to by appellants, and judgment rendered for appellee.

The following alleged errors have been assigned in this court :

- 1st. Overruling Chancellor's demurrer to the second paragraph of the complaint ;
- 2d. Overruling Edwards' demurrer to the complaint ;
- 3d. Error in the conclusions of law.

The controversy is over the proper construction of the deed. The court substantially found the facts to be as follows: That lot No. 205, in the city of Vincennes, was, on the 2d day of March, 1869, by the then owner, conveyed to Mrs. Celestine Beall and Mr. John S. Beall, who were husband and wife, by the following deed :

"This indenture witnesseth, that John Desire Vacelet and Mary Victorine Vacelet, his wife, of the city of Vincennes, of Knox county, in the State of Indiana, convey and warrant to Mrs. Celestine Beall and Mr. John S. Beall, of the same city of Vincennes, of Knox county, in the State of Indiana, for the sum of four hundred dollars, the following real estate, in Knox county, in the State of Indiana, to wit : Lot two hundred and five (205), in the now city of Vincennes, according to Johnson and Emmerson's survey of the borough of Vincennes, said lot 205 to be held by Mrs. Celestine Beall as her own property, Mr. John S. Beall having the possession of the same during his lifetime ; said possession to return to Mrs. Beall if she survives her husband. Mr. and Mrs. Beall will pay the taxes now due, \$37.34, and taxes for the present year."

Mrs. Celestine Beall died August 2d, 1872. Mr. John S. Beall died March 2d, 1873. Appellee was eighteen years old in January, 1879. On the 20th day of November, 1875, said lot was sold under an order of the court, by the admin-

Edwards et al. v. Beall, by Next Friend.

istrator of John S. Beall's estate, to the appellant John C. Chancellor, for the sum of three hundred dollars, appellee having been made a party to the petition to sell, he being the only heir of the said John S. and Celestine; that said sale was reported to and approved by the court; and the estate of said John S. was finally settled, and the administrator thereof discharged, September, 1876. Said administrator executed a deed to said Chancellor for the lot, November 29th, 1875; and said Chancellor executed a deed for the same to said Edwards, August 4th, 1876. Said Edwards took possession of the lot at the date of his deed, and has held the same ever since; that the improvements thereon made by him exceeded the value of the rents in the sum of \$323.72.

Upon which facts the court found as conclusions of law the following:

"1st. The deed to John S. and Celestine Beall vested in Celestine the title in fee to said lot, subject to an estate for life of said John, if he survived.

"2d. Upon the death of Celestine, the undivided two-thirds of said lot descended immediately from her to said Albert, subject to the life-estate of said John, and was not liable to be assets for the payment of the debts of said John; and said John thereupon became seized in fee of the other undivided third of said lot.

"3d. That, as to the undivided two-thirds of said lot, which descended to said Albert from said Celestine as aforesaid, the decree of this court, ordering the sale thereof for the payment of the debts of said John S. Beall, and the decree of the court confirming said sale, were obtained through mistake, within the meaning of section 176 of the act for the settlement of decedents' estates, approved May 6th, 1852.

"4th. That said Albert Beall is entitled to have said decree, ordering and confirming said sale by said administrator of said lot to said Chancellor, annulled and set aside as

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to the undivided two-thirds of said lot, and to have his title thereto quieted.

"5th. That said Albert is not required, by the law, to wait until twenty-one years of age before bringing suit to annul and set aside said decree.

"6th. That, as to the plaintiff, the decree ordering and confirming said sale by said administrator, the deed of said administrator to said Chancellor, and the deed of said Chancellor to said Edwards, ought to be set aside and annulled, as to the undivided two-thirds of said lot.

"7th. That the partition of said lot ought to be made between the plaintiff and the defendant Jesse P. Edwards, by assigning to the plaintiff so much of said lot as shall equal in value two-thirds of the difference between the fair cash value of said lot, as now improved, and \$323.72; and by assigning the residue to said defendant Edwards."

The first paragraph of the complaint was simply for the partition of the lot between appellee and appellant Edwards, alleging that they were owners thereof, and tenants in common, that appellee was entitled to two-thirds, and said appellant one-third thereof.

There was no error in overruling Edwards' demurrer to that paragraph, and sustaining Chancellor's demurrer to the same.

Appellant Chancellor insists that the demurrer to the second paragraph of the complaint ought also to have been sustained, for the reason that he was never made a party to the action; that, although the appellee obtained leave of the court to amend his complaint and make appellant a party defendant, and it was reported to the court that the amendment had been made, yet in fact it never was done. If he was not a party to the action, he has no right to be heard, in this court, in relation to what was done in the premises by the court below. The record shows that he appeared in court and filed a demurrer to each paragraph of the com-

Edwards *et al.* v. Beall, by Next Friend.

plaint; he thought he was a party, and the court thought he was a party; and we think it nothing but right to treat the complaint as having been amended in the court below, according to the understanding of the parties and the court, and that he is properly in this court. If he went to trial without an answer, that was his fault, and he is presumed to have relied upon the rulings on his demurrer; and the complaint will be deemed to be controverted, as if a denial was filed: *Casad v. Holdridge*, 50 Ind. 529; *Purdue v. Stevenson*, 54 Ind. 161.

As to the sufficiency of the facts in the second paragraph of the complaint, that depends upon the correctness of the construction of the deed given by the court in its conclusions of law upon the special findings.

Appellants' counsel very earnestly and learnedly insist, that, by the terms of the first named deed, a joint tenancy by entireties was vested in John S. Beall and his wife Celestine; that, at the death of his wife, the whole lot in fee simple belonged to John S., and was subject to sale for the payment of his debts. All this would follow if that be a correct construction of the deed. *Jones v. Chandler*, 40 Ind. 588; *Chandler v. Cheney*, 37 Ind. 391; *Simpson v. Pearson*, 31 Ind. 1; *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424; *Bevins v. Cline's Adm'r*, 21 Ind 37.

If the premises or conveying clause of the deed had no qualification, limitation, or condition in the subsequent parts of the deed, there would be no doubt about the correctness of appellant's construction. Or, if the subsequent parts of the deed are so repugnant and contradictory to the first, that they can not all be reasonably enforced, then the former will supersede the latter. 3 Washburn Real Property, 3d ed., p. 319; 2 Hilliard Real Property, pp. 483 to 489.

In this deed we have qualifying terms following the premises in the deed. And it is the duty of the court to so construe the language of the deed as to carry out the intention

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of the parties, if this can be done without doing violence to the language used.

In the case of *Prior v. Quackenbush*, 29 Ind. 475, p. 478, we find the following doctrine quoted approvingly:

"It is well said by Chief Justice TILGHMAN in *Wager v. Wager*, 1 Serg. & R. 374, that 'one of the most important rules in the construction of deeds is so to construe them that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. It never could be a man's intent to contradict himself; therefore, we should lean to such a construction as reconciles the different parts, and reject a construction which leads to a contradiction. The premises of a deed are often expressed in general terms, admitting of various explanations in a subsequent part of the deed. Such explanations are usually found in the *habendum*.'

"The office of the *habendum* is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, by the premises, in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises.'"

This is also approved in the case of *Carson v. McCaslin*, 60 Ind. 334. The facts in this case are very similar to the one under consideration; and, in deciding the case, Judge WORDEN uses the following language: "Now, we do not think there is such a repugnance or contradiction between the premises of the deed in question and the *habendum*, as renders the latter void. The language of the premises, to be sure, purports to grant the property to Henry McCaslin in fee, but the *habendum* explains, limits and qualifies that which is thus stated in general terms in the premises, and shows that he took the land for life, at all events, and his heirs the fee, if he should survive his wife; but, if she should survive him, the fee was to be vested in her."

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So, in this case, although the general language in the premises purported to convey the property to Celestine and John S. Beall in fee, but the *habendum* explains, limits and qualifies that which is thus stated in general terms in the premises, and shows that he took the land for life, and his wife the fee simple, subject to his life-estate; her heirs would inherit the property, subject to his life-estate; and that it was not subject to sale by his administrator for the payment of his debts, except the portion inherited by him from his wife.

The language of this deed is, "Convey and Warrant to Mrs. Celestine Beall and Mr. John S. Beall. * * * To be held by Mrs. Celestine Beall as her own property, Mr. John S. Beall having the possession of the same during his lifetime. Said possession to return to Mrs. Beall if she survives her husband." The evident intent of the parties in the use of the foregoing language was, that an interest in the property should be conveyed to both of them; and then the extent of that interest is explained, by saying that he should have the possession during his lifetime, but the property should be hers, the fee simple should be in her, subject to his life-estate.

The last clause, in relation to the return of the possession to her if she should outlive him, may be regarded as superusage, as the result would be the same without that clause. We think there was no error in the court's conclusions of the law, or in overruling the demurrs to the second paragraph of the complaint. See *Elliott v. Frakes*, 71 Ind. 412.

In the conclusion, appellant's counsel, in their brief, insist that appellee had no right to bring this suit before he had arrived at the age of twenty-one years. We do not see that this question is properly presented in the record. The age of appellee is not named in the complaint, therefore the question could not be raised by demurrer. And, if it was, the cause assigned in the demurrer was the want of sufficient facts, and there was no cause assigned of the want of capacity in appellee to sue; therefore, the demurrer did not raise

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the question. There was no answer filed presenting the question. According to sec. 54, 2 R. S. 1876, p. 59, "When any of the matters enumerated in section fifty" (and "no legal capacity to sue" is the second one) "do not appear upon the face of the complaint, the objection (except for misjoinder of causes) may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same," except as to jurisdiction and sufficient facts. Buskirk's Practice, 170 and 171.

But, if the question was properly presented, we think that sec. 177, 2 R. S. 1876, p. 554, is simply a statute of limitation, as to how long time a plaintiff has after he comes of age, in which he may bring his suit, and does not prevent him from bringing his suit before he becomes of age, as well as within three years after he arrives at age. We see no error in this record for which the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, with costs.

No. 7837.

THE BOARD OF COMM'RS OF MARION CO. v. CHAMBERS.

EVIDENCE.—Value of Services of Physician in Post Mortem Examinations.—In an action by a physician against a board of county commissioners, for services rendered in conducting *post mortem* examinations under employment by the coroner, it is wholly immaterial, in determining the value of the services, what is or has been the average daily income of such physician from his profession.

SAME.—Expert Testimony.—Where, in such action, witnesses testified as experts as to the value of such services, but stated they had no knowl-

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edge as to what other physicians had charged for such work, but based their opinion on what they thought the services were worth, such evidence is competent to go to the jury.

SAME.—Evidence as to what price the board of commissioners could have procured the services of other physicians to do such work is incompetent.

From the Marion Superior Court.

J. T. Dye and A. C. Harris, for appellant.

ELLIOTT, J.—John Chambers was employed by the coroner to conduct three *post mortem* examinations, for which he filed a claim for \$180. The commissioners allowed \$105, and from this order the appellee appealed to the Superior Court. The case was tried by a jury, and the appellee recovered a verdict and judgment for the amount claimed by him.

The only questions discussed by counsel are those arising on the assignment of error based upon the ruling denying a new trial.

Counsel hint rather than assert that the amount allowed appellee is excessive, and we are not, therefore, disposed to examine the question with much care. It may be remarked, however, that there was much evidence fully sustaining the jury's estimate of the value of appellee's services.

Appellant's counsel asked the appellee, on cross-examination, this question: "What has been your average daily income from your profession for two years past?" The court refused to permit it to be answered, and sustained the objection interposed by appellee's counsel. There was no error in this. Whether the income of the appellee was much or little was entirely immaterial. If a surgeon properly performs a surgical operation he is entitled to recover the reasonable value of his services, neither more nor less, whether his professional income be ten or ten thousand dollars a year. The value of the services can not be measured by the professional income of any series of years. If the physician or surgeon possesses the requisite skill and knowledge, and exercises such knowledge and skill properly, he is entitled

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to be paid the reasonable value of services rendered by him, irrespective of the question of his yearly professional income.

It is argued that the trial court erred in refusing to strike out the testimony of Doctors Parvin and Comingore, for the reason that they had no knowledge of the prices usually charged for making *post mortem* examinations. These witnesses testified, upon their examination in chief, that they were physicians and surgeons, and that they were competent to testify to the value of services rendered in making *post mortem* examinations ; but, on cross-examination, Dr. Comingore stated : "I don't know what physicians have charged for making *post mortems* for county ; I know nothing of the prices at which such services can be procured ; I judge from what I think it would be worth ;" and, upon cross-examination, Dr. Parvin said : "I have never made examinations for the county ; my testimony is based upon all the circumstances. I based my opinion on what I think is the value of such services, irrespective of the price charged or paid."

No error was committed in overruling appellant's motion. The testimony was competent, for the witnesses were shown to be experts, and to possess such knowledge, skill and acquaintance with the subject under investigation as entitled them to express their opinions to the jury. They may have had some knowledge of the value of such services, without knowing anything at all about what others were charging for like services. The question for the court was, not what was the weight or value of such opinions, but were they relevant, and were they of any material weight? What weight shall be given such opinions is one thing, and whether they shall be expressed at all or not is quite another. It is clear from the statements of the witnesses, that they were skilled in their profession, and that they did have sufficient acquaintance with the nature and value of services rendered in *post mortem* examinations to entitle their opinions to go in evidence.

Appellant's counsel propounded to one of the members of

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the board this question: "At what price could you have procured competent physicians to make *post mortem* examinations during the years 1877 and 1878?" This question was followed by the proper offer of evidence, but appellee's objection to the question was sustained and the evidence excluded. This ruling was correct. The question in issue was, not what others would have done the work for, but what was the reasonable value of the services of appellee? It was no more competent for the appellant to introduce the offered evidence than it would have been for the appellee to prove that any other surgeon would have charged twice as much as the sum claimed by the appellee. It was proper for appellant to call competent witnesses to give their opinions of the value of the services, but not to prove particular bargains or offers.

Judgment affirmed, at costs of appellant.

75	412
196	13
75	412
181	341
75	412
135	668
75	412
141	58

No. 7787.

SMITH ET AL. v. BORUFF.

PROMISSORY NOTE.—Consideration.—Satisfaction of Mortgage.—Agreement to Surrender on Settlement.—Evidence.—Where a mortgagor, to procure a release and satisfaction of the mortgage, and thereby secure a needed loan and save himself from financial ruin, executed the note sued on upon the agreement of his mortgagee, the payee, that if, upon settlement, it appeared that the mortgage note had in fact been paid as by him claimed, he would surrender it, the trial court erred in excluding evidence offered by the defendant, tending to prove that the mortgage note had been fully paid before the note sued on was given, and that the latter was without consideration.

SAME.—Consideration Open to Inquiry.—Parol Evidence.—The consideration of a written contract is open to inquiry, and the consideration of a promissory note, or the want of it, may be shown by parol evidence.

SAME.—The surrender of a satisfied note and the cancellation of a mortgage given to secure it are not alone sufficient considerations to support a new note for a sum claimed to be due on the old note.

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SAME.—*Promise of Party Legally Bound.*—Where a party is legally bound to do a thing, as to enter satisfaction of a mortgage when payment has been made, a promise made to induce him to do it is without consideration.

SAME.—*Agreement to Inquire into Consideration.*—*Evidence.*—Evidence that, at the time a new note was executed, the parties reserved the right to inquire into its consideration, is proper.

SAME.—*Compromise.*—*Executory Contract.*—*Colorable Ground.*—There must be at least a colorable ground of a claim, in law or in fact, to sustain an executory contract, given as a compromise of it.

SAME.—A creditor can not, by denying payments he has received, create a controversy which will support a promise by his debtor to pay him again, in whole or in part, as the price of doing that which law and equity require him to do without further compensation.

From the Monroe Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellants.

D. E. Beem, W. Hickman, J. H. Louden and R. W. Miers, for appellee.

NEWCOMB, C.—This is an appeal from a judgment on a promissory note given to the appellee by the appellants.

The only error assigned, that is insisted upon, is the overruling of the motion of appellants for a new trial. The defendants answered, *inter alia*, that the note was given without any consideration whatever. Other paragraphs alleged that the consideration of the note had failed, and gave a history of the circumstances which led to its execution, as follows: That one Hillary Campbell had been indebted to the plaintiff on a promissory note, secured by a mortgage of real estate; that Campbell paid a part of the amount of the note, and then sold the mortgaged premises to the defendant Smith, who, as a part of the purchase-money, agreed to pay the residue of said note and mortgage; that he, Smith, did afterward pay to the plaintiff the full amount of interest and principal thereof, but said mortgage was not released of record; that, subsequent to the payment of said note, the defendant Smith became financially embarrassed, and found it necessary for him to mortgage the land so purchased of Campbell, with other lands, in order to

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procure a loan of money, and, to do this, it was essential to have a release of the Campbell mortgage; that he applied to the plaintiff to execute such release, but the latter refused, and claimed that there was still due him \$283 on Campbell's note. This Smith denied, and insisted that said note had been wholly paid; but in order to procure a satisfaction of record of the mortgage, and thus secure the needed loan and save himself from financial ruin, he executed the note sued on, with his co-defendant as surety thereon; that it was agreed between Smith and the plaintiff when the note was executed, that if the note of Hillary Campbell had in fact been paid, which was to be determined by a settlement to be had between them, the plaintiff would surrender the new note; that plaintiff had refused to make such settlement, though often requested so to do, wherefore the consideration of said note had failed. The plaintiff replied to the several answers by a general denial

At the trial the defendants offered evidence that the Hillary Campbell note had been fully paid before the execution of the note sued on; but, on the objection of the plaintiff, the evidence was excluded, to which the defendants excepted.

The grounds on which this evidence was excluded seem to have been that it was an attempt to contradict by parol proof the terms of the note, and that the surrender of the Campbell note, with the release of the mortgage by which it had been secured, was a sufficient consideration to support the note in suit. The instructions to the jury embodied the same theories.

It is a fundamental principle of the law of evidence, that the terms of a written contract can not be contradicted or varied by a contemporaneous verbal agreement; but the doctrine is equally well settled, that the consideration of a written contract is open to inquiry, and that the consideration, or the want of it, may be shown by parol testimony.

If the Campbell note had been fully paid before the ex-

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ecution of the note sued on, the latter was without consideration, unless the surrender of the satisfied note and the cancellation of the mortgage were sufficient considerations to support it.

We think the propositions self-evident, that when a note has been paid it ceases to have any value as a basis for a new promise in consideration of its surrender to the maker, and that a mortgage made to secure such note is by the act of payment discharged and satisfied, and becomes *functus officio*. *Ledyard v. Chapin*, 6 Ind. 320, and *Francis v. Porter*, 7 Ind. 213. It follows that if the holder of a note and mortgage that have been paid exacts a new note as a condition of cancelling them, such note is without consideration. Indeed, so far as the mortgage is concerned, the statute imposes upon the mortgagee the duty of entering satisfaction of it of record, when he has received payment, and is requested so to do by the mortgagor. 2 R. S. 1876, p. 334, sec. 5. And the general rule of law is, that, where a party is legally bound to do a thing, a promise made to induce him to do it is without consideration. *Reynolds v. Nugent*, 25 Ind. 328; *Ritenour v. Mathews*, 42 Ind. 7; *Fensler v. Prather*, 43 Ind. 119.

The court gave the following instruction to the jury: "If you find that there was a controversy between Boruff and Smith as to whether the mortgage and note that Boruff held on Campbell was paid, and that Boruff refused to give up and cancel the note and mortgage to Smith, until he, Smith, or Campbell paid what he claimed was due on it, and Smith and Campbell, protesting that they did not owe the note, yet for the purpose of having their land released from the said mortgage, did execute the note in suit, and Boruff thereupon surrendered the note and mortgage, the note would be upon a sufficient consideration. The consideration in such case is the settling of the controversy, and the surrender of the old note and mortgage."

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As we have seen, the surrender of the Campbell note and mortgage after they had been paid was not a consideration that could vitalize the new note.

As to the charge that the settlement of the controversy was a sufficient consideration, we may make two observations:

1st. The charge ignores the allegations of the answer and the evidence offered in its support, that the note was not given as a final settlement of the supposed dispute, but that by the terms of the agreement under which it was executed, the parties reserved the right to further inquire into its consideration.

2d. That there must be at least a colorable ground of a claim, in law or in fact, to sustain an executory contract, given as a compromise of it. Can this be the case when the holder of a note has himself received payment thereof, and, notwithstanding such payment, insists on holding on to a security and to the note secured, the helpless debtor protesting meanwhile that payment has been made? It is not laying down too stringent a rule, in such a case, that the creditor shall be held to have knowledge of payments that he has received, and that he can not, by denying such payments, create a controversy which will support a promise to pay him a second time, in whole or in part, as the price of doing that which the law, and equity and good conscience, require that he shall do without further compensation. In *Jarvis v. Sutton*, 3 Ind. 289, it is said: "It is true a compromise of doubtful claims may be sufficient to found a consideration upon, but in such cases there must be a surrender of some legal benefit which the other party might have retained. In other words, there must be some consideration for a compromise, as well as for any other contract, if it is unexecuted and remains to be enforced. A promise to give something for the compromise of a claim,* for which there is no legal foundation whatever, is not sufficient to sustain a suit at law." See, also, *Schnell v. Nell*, 17 Ind. 29; *Coy*

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v. *Stucker*, 31 Ind. 161; *Spahr v. Hollingshead*, 8 Blackf. 415. For the error of the circuit court in excluding competent evidence, and giving the instruction above set forth, the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, at the costs of the appellee, and that said cause be remanded to the Monroe Circuit Court, with instructions to sustain the motion of the appellants for a new trial.

75	417
127	255
75	417
183	556
75	417
1153	598

No. 6882.

FELGER v. ETZELL.

PLEADING.—*Complaint.*—*Objection Cured by Verdict.*—*Motion in Arrest of Judgment.*—*Breach of Promise to Marry.*—*Consideration.*—*Mutual Promise.*—After verdict upon the trial of a complaint for breach of promise to marry, an objection that the complaint, in stating the mutual promises of the parties, alleged that the defendant's promise was made in consideration that the plaintiff *would* promise to marry him, and not that she *did* promise, was cured by the verdict, and came too late on motion in arrest of judgment.

PRACTICE.—*Trial without Answer.*—*Presumption of Issue Joined.*—*Supreme Court.*—Where the record fails to show that issue was joined by answer of the defendant, the Supreme Court will consider the case as if an answer in denial had been filed.

SAME.—*Breach of Promise to Marry.*—*Evidence of Illicit Intercourse Inadmissible.*—On trial of an action for breach of a promise to marry, where the complaint contained no allegations of illicit intercourse between the parties, and no answer was filed, evidence of such illicit intercourse was inadmissible to prove a promise to marry, or enhance the damages, or for any other purpose.

From the Allen Circuit Court.

L. M. Ninde, for appellant.

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Howk, C. J.—In this action, the appellee alleged, in substance, in her complaint, that on the 15th day of June, 1875, at Allen county, in consideration that she, being then unmarried, would, at the request of the appellant, marry him on request, he, the appellant, promised to marry the appellee within a reasonable time thereafter; that the appellee, confiding in said promise, had always remained ready and willing to marry the appellant; that the appellant had afterwards married a certain other person, to wit, one —————, contrary to his said promise to the appellee; and that, by reason of the premises, the appellee had sustained damages in the sum of five thousand dollars, for which she demanded judgment, etc.

It does not appear that the appellant filed any answer to appellee's complaint; but the parties appeared, and the cause was submitted to a jury for trial, and a verdict was returned for appellee, assessing her damages in the sum of thirteen hundred dollars, and judgment was rendered on the verdict.

In this court, the appellant has assigned as errors the following decisions of the circuit court:

1. In overruling his motion for a new trial; and,
2. In overruling his motion in arrest of judgment.

The second of these alleged errors presents for the decision of this court the question of the sufficiency of the complaint, after verdict thereon. There are many objections to a complaint which a party defendant might avail himself of, on appeal, if they had been presented at the proper time and in the proper mode, but they are supplied or cured by the subsequent proceedings in the cause. So, in the case at bar, the appellant's objection to the sufficiency of appellee's complaint, as we understand the objection, is one that was supplied by the evidence and cured by the verdict, before he even attempted to make any objection to the complaint. In stating the consideration of the appellant's promise to

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marry her, in her complaint, the appellee alleged, in substance, that the appellant's promise to marry her was made in consideration that she *would* promise to marry him, and not that she *did* promise to marry him. Of course, the validity of the appellant's promise, for an alleged breach of which the appellee has sued, in this action, to recover damages, is dependent upon the consideration existing for such promise ; and, if it affirmatively appeared that the promise was made without any consideration, the complaint would be bad, even after verdict, upon a motion in arrest of judgment. But the mutual promise of the appellee to marry the appellant was certainly a sufficient consideration to support his promise to marry her ; and it seems to us, that, in her complaint, she has attempted to allege her mutual promise to marry him as a consideration for his promise. It is true that the allegation of her mutual promise is defective, and not so clear and certain as it might have been ; but it is equally true, we think, that this defective allegation may have been and was cured by the verdict. *Donellan v. Hardy*, 57 Ind. 393 ; *Smith v. Freeman*, 71 Ind. 85 ; *Field v. Burton*, 71 Ind. 380 ; *The Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294. We are of the opinion, therefore, that the objection urged by the appellant's counsel to the sufficiency of the complaint, after trial and verdict thereon, came too late and must be regarded as obviated and cured by the verdict. The motion in arrest of judgment was properly overruled.

Under the alleged error of the court in overruling the motion for a new trial, the first point made by appellant's counsel, in argument, arises upon the action of the court in permitting the introduction of incompetent evidence, and in refusing to strike out such evidence. As originally filed, the appellee's complaint contained an allegation to the effect that on, to wit, June 25th, 1875, under his said promise, the appellant seduced appellee, and had illicit intercourse with

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her, and did frequently thereafter, under said promise of marriage, have illicit intercourse with her ; but this allegation the court struck out on appellant's motion before the commencement of the trial. Over the appellant's objections and exceptions, the court allowed the appellee to introduce evidence tending to show that, about the time the appellant promised to marry the appellee, as alleged, they engaged in illicit sexual intercourse. The question for decision is, did the court err in allowing this evidence to go to the jury, or in overruling appellant's motion to strike it out? It is very clear that the evidence complained of was not competent for the purpose of enhancing or aggravating the appellee's damages, where, as in this case, the complaint contains no allegation of her seduction by the appellant. *Cates v. McKinney*, 48 Ind. 562, and authorities cited. But, in the case at bar, the court gave the jury the following instruction in reference to the evidence complained of :

“You have no right to consider any evidence upon the subject of the illicit intercourse between the parties, as affecting the amount of damages, if you should find for the plaintiff. All the evidence of such illicit intercourse is incompetent to affect the question of amount of damages. Such illicit intercourse can be considered only by you in determining the question as to whether or not a contract was made by the parties to the action.”

The question remains, therefore, and this is really the controlling question in this case, was the evidence in regard to the illicit intercourse admissible or competent, even for the purpose to which it was limited by the court, namely, as tending to show a mutual promise of marriage existing between the parties. The appellant's counsel claims that the evidence was incompetent in the case now before us, because, as he says, there was no answer filed by the appellant in this case, and there was no denial of the alleged promise of marriage, and, therefore, the only question for the

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jury was the assessment of appellee's damages. This view of the matter, however, is not tenable under repeated decisions of this court; for, in such cases, where issue has not been joined by answer, this court has often decided that, after trial, it will be considered as if an answer in denial had been filed. *Casad v. Holdridge*, 50 Ind. 529; *Purdue v. Stevenson*, 54 Ind. 161; *Bass v. Smith*, 61 Ind. 72.

But was the evidence competent, even for the purpose to which it was expressly limited, in this case, by the instruction of the court? Can it be correctly said that the evidence of illicit intercourse between the parties even tended to prove that a contract of marriage had been made between them? It seems to us that these questions ought to be, and must be, answered in the negative; for, surely, it will not do to say that illicit sexual intercourse is the natural, necessary, or even customary concomitant or result of the mere promise of marriage. We are aware that there are many cases in which it has been held, that evidence of the conduct of the parties towards each other is admissible as tending to prove the existence of a promise of marriage; but such evidence, we think, should be limited, and, so far as we are advised, it has been limited, to the open, visible or public conduct of the parties toward each other. The illicit intercourse of parties is generally consummated in the strictest privacy and secrecy, and is known only to the parties themselves; and the evidence of the parties, or of others, in regard to such intercourse, can have no possible tendency to prove the existence of a promise of marriage. This must be so, as it seems to us, in the very nature of things, unless it can be correctly said (and we need hardly say that the proposition is unreasonable and untenable), that illicit sexual intercourse naturally, necessarily or generally attends upon the mere promise of marriage, and is, therefore, one of the *indicia* of the existence of such promise.

We are clearly of the opinion, therefore, that the evidence of the illicit intercourse between the parties was wholly

Monroe et al. v. Paddock, Trustee.

inadmissible, in this case, for any purpose, and that the court erred, both in its admission of such evidence and in its refusal to strike it out. For these errors of law, committed at the trial, the appellant was entitled to a new trial of this cause, and the court erred in overruling his motion therefor.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to sustain the appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

No. 8106.

MONROE ET AL. v. PADDOCK, TRUSTEE

PRACTICE.—Summons.—Return Day.—How Ten Days' Service is Counted.—Statute Construed.—Under section 315 of the civil code, as amended by the act of March 6th, 1877, Acts 1877, p. 105, the ten days' service of a summons on a defendant is counted by excluding the day of service and including the return day. Service on the 9th day of June for the 19th was good ten days' service.

SAME.—Setting Aside Default.—Excusable Neglect.—Where court met and entered default and judgment at 8 o'clock in the morning of the return day, and, by affidavit submitted the same day, the defendants showed that they lived eleven miles distant, had no public conveyance, travelled by private conveyance, reached the court-house at 9 o'clock, and employed counsel, and set forth therein a good and legal defence to the whole of plaintiff's claim, the trial court erred in overruling their motion to set aside the default and permit them to answer the complaint. Such neglect may well be regarded as excusable neglect, under section 99, 2 R. S. 1876, p. 82.

SAME.—Promissory Note.—Defence.—Alteration.—In such case, being an action on promissory notes, a defence that, since the execution by the defendants of the notes sued on, the notes had been materially altered, and that they never executed them as they appeared, constituted a good defence.

From the Starke Circuit Court.

J. D. McLaren, for appellants.

T. J. Merrifield and *W. C. Boyles*, for appellees.

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BICKNELL, C. C.—The appellants were the makers of two promissory notes, payable to the order of Gallup & Peabody, and to secure the payment thereof they mortgaged land to Paddock, as trustee. The notes being due and unpaid, Paddock, as trustee, brought suit upon them and the mortgage, and obtained a judgment, from which this appeal was taken. The appellants assign four errors, to wit:

“*First.* The court erred in defaulting the defendants on the return day of the summons, the fourth day of the term, at the morning call of the docket.

“*Second.* The court erred in permitting the defendants to be defaulted on the morning of the return day of the summons, on less than ten days’ previous notice before the return day of the summons.

“*Third.* The court erred in refusing to hear appellants’ motion, and affidavit in support thereof, to set aside the judgment and default, which appellants’ counsel proposed to the court to file on the afternoon of the fourth day of the term, that being the return day of the writ.

“*Fourth.* The court erred in overruling appellants’ oral motion, supported by their affidavits, to open the judgment and set aside the default taken against them.”

By the act of March 6th, 1877, Acts 1877, p. 105, section 315 of the practice act was amended so that the plaintiff, by endorsement upon his complaint, may require the summons to be made returnable upon any day in term, and, if the summons be personally served ten days before such return day, the action shall stand for issue and trial at such term, etc.

The June term of the Starke Circuit Court, for 1879, began on the 16th of June. The complaint in this case was filed on the 7th of the same month. It was endorsed by the plaintiff’s attorney as follows: “Clerk will issue summons for defendants to the sheriff of Starke county, Indiana, for the fourth day of the term.” The fourth day of

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the term was the 19th day of June. The summons was issued returnable on that day, and was returned by the sheriff as personally served on each of the appellants, on the 9th day of June. The appellants were defaulted, and judgment was rendered against them, upon the default, on the 19th day of June. They claim this was not ten days' service, within the meaning of the act of March 6th, 1877.

Upon this point the same construction must be given to section 315, since the amendment, as was given before. It was always held that the time, in such cases, is counted by excluding the day of service, and including the return day. Service on the ninth day for the nineteenth was good ten days' service. *Womack v. McAhren*, 9 Ind. 6. The court below committed no error in rendering the judgment by default, on the 19th day of June.

The last two assignments of error may be considered together.

It appears by a bill of exceptions, that, in the afternoon of the return day, "the appellants appeared, by counsel, and proposed to file their affidavits to set aside the default and judgment against them, and that the court, being otherwise engaged, the same was filed and heard the next morning, which motion and affidavit are as follows, to wit:

"State of Indiana, Starke county, ss: In the Starke Circuit Court.

"George L. Paddock, Trustee, etc., v. Norman Monroe and Addison Morrow. Affidavit and motion to set aside default.

"Norman Monroe and Addison Morrow, defendants in the above entitled case, being each duly sworn, upon their respective oaths, say that they were summoned to appear to-day in this court, to answer the plaintiff's complaint in the above stated action, and, in obedience to said summons, they started from their respective homes, distant eleven and twelve miles from the court-house; that the only way of

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reaching the court-house, from their homes, is by private conveyance, and they came in a buggy ; that they reached Knox about 9 o'clock this forenoon, intending to retain counsel to enter an appearance and file an answer for them in said action ; that they repaired to the court-house immediately after their arrival in Knox this morning, where they learned that they had been defaulted, and judgment entered against them in said action, the court having met at 8 o'clock A. M. this morning, as affiants are informed and believe ; that they have a good and legal defence to the whole of plaintiff's claim in said action, the nature and character of which is as follows : That they never executed the notes mentioned in the complaint, nor either of them, as they now appear ; that the figures '20,' before the word dollars in the last line of each of said notes, has been inserted since said notes were executed, without the knowledge or consent of these affiants, or either of them ; that said notes, when they were executed, had no amount of attorney's fees expressed therein, and it was agreed and understood that affiants were not to pay any attorney's fees, but as they now appear they each provide for \$20 attorney's fees, which has been added since their execution, without affiants' knowledge and consent, and affiants say that they did not execute said notes.

[Signed]

"N. MONROE,

"ADDISON MORROW.

"Subscribed and sworn to, in open court, this 19th day of June, 1879. M. P. HEPNER, Clerk."

The motion was overruled, and the appellants excepted.

Under the circumstances set forth in the affidavits, the motion to set aside the default ought to have been sustained ; the defendants had a good defence. *McCoy v. Lockwood*, 71 Ind. 319. The default was taken according to law on the 19th day of June, but the appellants on that day were striving to obey the summons. The meeting of the court at 8 o'clock in the morning enabled the appellee to obtain his

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judgment by default before the appellants reached the court-house. But the appellants were there about 9 o'clock ; they had their affidavits ready, and made their motion to set aside the default on the same day, the tenth day after service of the summons ; the court declined then to hear it, but heard it, the next morning. That is the same as if it had been heard on the return day ; the appellants lived a long way from the court-house ; there was no public conveyance ; they had to travel in a private vehicle. Their neglect to be in the court-house at 8 o'clock in the morning, under the circumstances of this case, may well be regarded as excusable neglect. Practice Act, sec. 99 ; *Hunter v. Francis*, 56 Ind. 460 ; *Bristol v Galvin*, 62 Ind. 352.

The judgment of the court below ought to be reversed, and the cause remanded, with instructions to said court to grant the motion to set aside the default and judgment, and to permit the appellants to answer the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to set aside the default and judgment, and permit the appellants to answer the complaint.

No. 7522.

THE INDIANAPOLIS, PERU AND CHICAGO R. R. CO. v. LINDLEY.

RAILROAD.—*Killing Stock.—Burden of Proof.*—In an action against a railroad company for killing stock upon the track of its road, at a place where the road was not fenced, the burden of proof that the road was not fenced at the place of the killing, or at the place of the entry of the animals upon the track, is on the plaintiff; but that it was not the company's duty to fence at such place, was matter of defence.

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SAME.—Evidence.—Fence.—Street.—Where, in such case, the evidence shows that the stock was killed between two streets of a city, on the track of the defendant's railroad, not fenced, where a fence might have been built without interfering with any street or alley, or with the customary operations of the road, the company is liable.

From the Marion Superior Court.

C. B. Stuart, D. Moss and R. R. Stephenson, for appellant.

W. P. Atkinson, for appellee.

Woods, J.—Action by the appellee against the appellant, for the killing of a cow upon the track of the appellant's railroad, at a point where the road was not fenced. Error is assigned upon the overruling of a demurrer to the evidence, offered by the plaintiff. Counsel are agreed that the only question is whether the road ought to have been fenced at the point where the cow was killed. The burden of proof that the road was not fenced at the place of the killing, or of the animal's entry upon the track, was upon the appellee; but that it was not the company's duty to fence at that place, was matter of defence. *The Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; *The Jeffersonville, etc., R. R. Co. v. O'Connor*, 37 Ind. 95; *The Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324. That the track of the road was not fenced at the place in question, is clearly shown; and the evidence falls far short of showing a good reason for not having fenced it. The injury was done at a point on the appellant's road about midway between Seventh and Eighth streets, in the northeastern part of the city of Indianapolis, where the land is level and there is no natural obstruction to fencing. Starting at Seventh street and extending northward beyond Eighth street, the company had a switch or side track, on the east side of its main track, connected therewith at each end. Branching from this side track, at a point north of Eighth street, and running southward to the north line of Seventh, was another switch, owned by Stough-

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ton A. Fletcher, Jr., situated on his land, and lying far enough east of the first named side track to permit the building of a fence between them, from one to the other of said streets, without interfering with the passage of cars. Between these streets, on the west side of the road, there was no side track, and a fence along the line of the right of way might have been built, without interfering with any street or alley, or with the customary operations of the road. Between said streets, the company kept no place for receiving or discharging either passengers or freights, loading or unloading cars. A year or more before the killing of the appellee's cow, the company had delivered there material for the construction of the gas-holder, situated at the south end and on the east side of Fletcher's switch, and, beside this, within the five or six years last passed, had unloaded between said streets five or six car loads of lumber, to be used in the construction of buildings near by; and, excepting these things, the only use to which the company had put its said switch had been to stand its cars thereon, or the like, which could have been done as well with, as without, fences and cattle-guards.

The judgment is affirmed with costs.

— • —
No. 8205.

THE INDIANA MANUFACTURING CO. v. PORTER.

ORDER FOR MONEY.—Action on.—Promise.—Consideration.—Pleading.—

Where an order is given payable out of a particular fund, it operates as an equitable assignment of so much of such fund as is specified in the order, and in a suit therefor no consideration need be averred for the promise of the holder of the fund to pay it.

SAME.—When Promise of Drawee to Pay not Necessary.—An obligation of

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the holder of such fund to pay the drawer of such order imposed upon him the duty to pay the payee of the order, and, if he received and retained the money ~~as~~ alleged, the payee can maintain a suit therefor against the holder of the fund without an express promise to pay it.

SAME.—Demand.—If, before such suit, any demand was necessary, the allegation in the complaint, that “the defendant refused to pay the plaintiff, though often requested,” shows a sufficient excuse for not making a formal demand for payment.

STATUTE OF FRAUDS.—*Promise of Debtor.*—Where a debtor promises to pay the debt to one other than the creditor, such promise is not within the statute of frauds.

From the Miami Circuit Court.

R. P. Effinger and N. O. Ross, for appellant.

J. L. Farrar, J. Farrar and — Carpenter, for appellee.

BEST, C.—This action originated before a justice of the peace, and was founded upon the following order:

"The Indiana Mfg. Co. will pay J. R. Porter, or order, \$40.00 from any amount due me on orders, or for services, and \$20.00 from any amount which may be due me for the month of September, and \$20.00 from any amount which may be due me from orders or services for October; and \$20.00 which may be due me from orders or for services for November, 1876. JOHN STILLINGER."

The appellee was the plaintiff, and it was averred in the complaint, that John Stillinger, in the year 1876 delivered to the plaintiff the above order, "thereby directing the defendant to pay the plaintiff the several sums mentioned therein," which, "it is averred, the defendant promised the plaintiff to do." It is further averred that "the defendant retained, out of the moneys going to and belonging to said John Stillinger, from the defendant herein, \$20.00 for the month of September, \$20.00 for October, and \$20.00 for November, 1876, in all \$60, which defendant refuses to pay to said plaintiff, though often requested so to do, but keeps and retains said money to his own use."

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The appellant was defaulted before the justice, appealed to the circuit court, and there moved to strike out the complaint for insufficiency. This motion was overruled, and an exception was taken. A trial by jury resulted in a verdict for the appellee. A motion for a new trial, because the verdict was contrary to the law and not supported by sufficient evidence, was overruled, and an exception reserved. Final judgment, from which the appellant appeals, and assigns as error, that the complaint is insufficient to sustain the judgment, that the court erred in refusing to strike out the complaint, and in overruling the motion for a new trial. Several objections are urged against the sufficiency of the complaint.

The first is, that no consideration is averred for the promise of the appellant. As the order was payable out of a particular fund, it operated as an equitable assignment of so much of said fund as is specified in the order, and in a suit for such part of the fund no consideration need be averred for the promise of appellant. *McKernan v. Mayhew*, 21 Ind. 291; *Morton v. Naylor*, 1 Hill, 583.

The obligation of appellant to pay Stillinger imposed upon it the duty to pay Stillinger's assignee, and if appellant received and retained the money as alleged, the appellee could maintain the suit without averring an express promise. Again, the reception and retention of the money belonging to the appellee, as averred, rendered it liable to him without an express promise.

The second objection is, that the promise was to pay the debt of another, and, as it was not in writing, it is within the statute of frauds. This is a mistake. The promise was not to pay the debt of another, but a promise to pay appellant's own debt to another. Such promises are not within the statute. Browne Statute of Frauds, section 165.

The remaining objection is, that no special demand was

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averred. If a demand were necessary, the allegation that "the defendant refused to pay the plaintiff, though often requested," is a sufficient excuse for not making it.

The motion for a new trial was properly overruled. The evidence tended to support every material averment in the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 8117.

MULLENDORE ET AL. v. WERTZ.

PROMISSORY NOTE.—Principal and Surety.—Extending Time of Payment.—

Joint Makers.—Suretyship Unknown to Payee.—Release.—An agreement between the payee and one of two joint makers of a note, without the knowledge or consent of the other, a surety in fact but not known as such to the payee, does not have the effect to release the non-consenting maker. *Hall v. Hall*, 34 Ind. 314, distinguished.

SAME.—The mere giving of time to one of two joint obligors whose obligations are equal will not discharge the other.

SAME.—Oral Agreement.—Covenant not to Sue.—Giving time by oral agreement can not have any greater effect than a covenant by a creditor not to sue for a specified time one of two or more joint debtors. Such a covenant is not a release and furnishes no defence to the other debtor.

SAME.—Knowledge of suretyship is not presumed in favor of the sureties, but must be proved.

SAME.—A covenant with one joint debtor not to sue is a mere personal covenant.

SAME.—Surrender of Old Note for New.—Maker a Principal.—Where an heir, at the request of one of two joint makers, received their note as a part of his distributive share of the estate to which it belonged, and surrendered it for their new note for the amount of the old, as between himself and the payee, such maker became a principal.

SAME.—Answer of Release.—Reply.—In an action upon the new note, such facts constitute a good reply to an answer of discharge by extension of time of payment orally given his co-obligor in both notes.

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SAME.—Evidence.—Receipt of Heir to Administrator.—On trial of such action, the court did not err in admitting in evidence the receipt of the heir, accompanied by testimony of the administrator explaining its execution and its terms, and that the amount included the old note.

From the Shelby Circuit Court.

T. B. Adams and L. T. Michener, for appellants.

B. F. Love and H. C. Morrison, for appellee.

MORRIS, C.—This suit was brought upon the following promissory note:

“February 14th, 1877.

“One year after date we promise to pay John Wertz, or order, eight hundred and $\frac{8}{10}$ dollars, with interest at ten per cent. per annum after maturity, and with attorneys' fees, value received, and without any relief whatever from valuation and appraisal laws.

“\$800.80.

CLINTON MULLENDORE.

“**GEORGE MULLENDORE.**

Clinton Mullendore made default. George Mullendore answered the complaint in four paragraphs. The first was the general denial, which was afterward withdrawn.

The second paragraph admits the execution of the note, but avers that George Mullendore executed it as the surety of Clinton Mullendore, which fact was known to the appellee; that afterward, with such knowledge, and without the pleader's consent or knowledge, the appellee agreed with Clinton Mullendore, for a sufficient consideration, to extend the time for the payment of said note for the period of four months from the time of its maturity; that by this agreement he had been released and discharged from liability on said note.

The third and fourth paragraphs of the answer were, in substance, the same as the second.

The appellee demurred separately to each paragraph of the answer. The demurrer was overruled. He then replied to the answer in four paragraphs, the last being a general

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denial. The appellant George Mullendore demurred to the first, second and third paragraphs of the reply. The demurrs were overruled. The cause was submitted to a jury, who returned a verdict for the appellee. The appellant George Mullendore moved the court for a new trial, which was overruled, and judgment was rendered upon the verdict.

The rulings of the court upon the several demurrs to the reply, and upon the motion for a new trial, are assigned as errors. George Mullendore alone appeals.

The first paragraph of the reply admits that, on the 2d day of February, 1878, in consideration of \$26.33, paid to the appellee by Clinton Mullendore, being the interest in advance on the note for four months, he agreed to extend the time for the payment of the note for four months, as stated in the appellant's answer, but it was also averred that at the time of making said agreement the appellee had no knowledge of the fact that the appellant George Mullendore was or claimed to be the surety of Clinton Mullendore on said note, as stated in said answer.

The question raised by the demurrer to this paragraph of the reply is, does an agreement made between the payee and one of two joint makers of a note, without the knowledge or consent of the other, who is in fact the surety of his co-maker, have the effect to release the non-consenting joint maker from his liability, though the payee of the note was, at the time of making the agreement, ignorant of the fact that he was such surety. If this proposition is to be answered in the affirmative, as the appellant insists it should be, the reply is bad, and the demurrer should have been sustained; if in the negative, the reply is sufficient, and the demurrer was rightly overruled.

The appellant insists upon the following propositions:

First. That the verbal contract set up in the answer, and admitted by the reply, changed the contract evidenced by the note in a material part;

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Second. That one of two joint co-obligors is not authorized, without the consent of the other, to change the joint contract in any respect; and if he does, by a valid agreement, so change the contract, the non-consenting obligor is discharged.

The agreement alleged to have been made for the extension of the time for the payment of the note in suit is averred to have been made between the appellee and Clinton Mullendore. The consideration for the alleged extension was paid by Clinton Mullendore, not by George Mullendore, nor by them jointly, but by Clinton alone. George Mullendore was not a party to the contract. The contract should, therefore, be construed as the agreement and promises of the parties who entered into it; and for any violation of the terms of the agreement, or any promise or covenant contained in it, the offending party would be personally liable to the injured party, and to him alone. The agreement of the appellee must be construed as made for the benefit of Clinton Mullendore alone, and, in case of its breach, he alone would have the right to sue the appellee and recover such damages as he might have sustained.

In the case of *Draper v. Weld*, 13 Gray, 580, the court say: "If, as between McGregor and Stevens, they were co-sureties of Weld, the giving of time to one of them did not discharge the other, because the mere giving of time to one of two obligors, whose obligations are equal, will not discharge the other. *Dunn v. Slee*, Holt, N. P. 399, and 1 Moore, 2; Burge on Suretyship, 156. Giving time by oral agreement to McGregor can not have any greater legal effect than a covenant by a creditor not to sue, for a specified time, one of two or more joint debtors. Such a covenant is not a release, and it furnishes no defence to the other debtors. *Lacy v. Kynaston*, 12 Mod. 548; *Dean v. Newhall*, 8 T. R. 168; *Shed v. Peirce*, 17 Mass. 623; *Wilson v. Foot*, 11 Met. 285." The verbal agreement can not,

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we think, be held to have discharged George Mullendore on the ground that it changed the contract evidenced by the note in a material part.

In the case of *Wilson v. Foot, supra*, it is held that, where a note is signed by several parties, though part of them are, in fact, sureties for the others, yet, if that does not appear upon the face of the note, the payee does not discharge the sureties by giving time to the principal debtor, unless he had knowledge, at the time of so doing, that the other makers were sureties; and that such knowledge is not to be presumed in favor of the sureties, but must be proved; that a covenant not to sue one or more joint makers of a note does not discharge or release the others, it being regarded as a mere personal covenant. 2 Daniel Negotiable Inst., p. 289. There are many decisions of this court in full agreement with the above cases: *McCloskey v. The Indianapolis, etc., Union*, 67 Ind. 86; *Davenport v. King*, 63 Ind. 64; *Huff v. Cole*, 45 Ind. 300.

In the case of *Davenport v. King, supra*, the court, quoting from *Neel v. Harding*, 2 Met. (Ky.) 247, says: "If they were all principals, an agreement with one of them to give further day of payment would not operate to release or exonerate the others. Such an agreement can not be allowed to have any more effect than it would have if the promisors were all actually, as they all appear to be, principals in the note, unless the holder, at the time he entered into the agreement, had notice that the parties who claimed to be sureties did occupy that attitude on the paper."

In some of the paragraphs of the answer, the agreement to extend the time of payment is alleged to have been made before the maturity of the note. This can make no difference. The agreement was the agreement only of the parties to it. The note still remains in full force, unaffected by the agreement for the extension of the time of payment. We have examined the authorities referred to by the appell-

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lants' counsel, and think them not opposed to the conclusion which we have reached.

In the case of *Hall v. Hall*, 34 Ind. 314, the Halls borrowed \$100, and each was to have \$50. This fact distinguishes that from the case now before us. In the case of *Crafts v. Mott*, 4 N. Y. 603, the land, for the purchase of which the instrument was given, was equally divided between the purchasers, and this was held to operate as a division of the debt. Each of the makers was regarded as principal debtor for one-half of the land purchased, and surety as to the other half.

In the case of *Cheetham v. Ward*, 1 Bos. & P. 630, one of the joint obligors had been appointed executor of the obligee, and thereby discharged. This was held to discharge the other obligor. In the case of *Rees v. Berrington*, 2 Ves. Jr. 540, it was held that where the creditor, without the consent of the known surety, gave further time to the principal, the surety was discharged. None of these cases is irreconcilable with the cases to which we have referred in support of our conclusion. The court did not err in overruling the demur-
rer to the first paragraph of the reply.

The second and third paragraphs of the reply are substantially the same, and may be considered together. The third may be stated, in substance, as follows: Jacob Wertz, the father of the appellee, died intestate in Shelby county, Indiana, in 1876. At the time of his death, he held a note executed by the makers of the note in suit. Mathias Wertz was appointed administrator of Jacob Wertz, deceased. He was about to commence suit on the note given by the appellants to his intestate, with a view to a speedy settlement of the estate. George Mullendore represented to the appellee that his co-maker of said note was insolvent and worthless, and that he would have to pay the same; that he desired the appellee to accept said note from the administrator as a part of his share of his father's estate; that he would pay

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it, but that he wanted the appellee to give him all the time he possibly could ; that if he should be compelled to pay said note at once, it would ruin him ; that the appellee was induced by these statements to accept of the administrator said note as a part of his share of Jacob Wertz's estate ; that, at the time he received said note from the administrator, he had no knowledge of the fact that George Mullendore was surety on the same, and that the amount due on it was \$800.80 ; that the note in suit was given for this amount, and the note received by appellee from said administrator surrendered to the appellant George Mullendore. The appellant stated to the appellee, at the time, that all he expected to be able to do for some time was to pay the interest on the note. It is averred that the appellee did not know that George Mullendore claimed to be surety on said note ; that he took it with the understanding that he was the principal and responsible party, to whom he was to look mainly for payment. The reply admitted the agreement for the extension of the time of payment as stated in the answer.

We think it quite clear that, upon the facts stated in the reply, George Mullendore, as between him and the appellee, became the principal debtor. He was liable upon the note held by the administrator of Jacob Wertz, and, because of the insolvency of his co-maker, he expected to have to pay it. At his request and for his benefit, the appellee accepted the note from the administrator as cash, in payment of his share of his father's estate. For the amount due on this note, the note in suit was given, and the old note surrendered to George Mullendore, who asked to be indulged to the utmost, on the ground that he would have it all to pay. The subsequent extension of the time of payment, thus solicited, in no way operated to the prejudice of the appellant. The surrender to George Mullendore of the note received by the appellee from the administrator of Jacob

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Wertz was a full and ample consideration for the note in suit; it moved directly to George Mullendore, and, as between him and the appellee, he must be held to be the principal maker of the note. Common fairness and justice demand this. There was no error in overruling the demurters to the second and third paragraphs of the reply.

On the trial, the court permitted the appellee to read in evidence, over the objection of the appellant, a receipt, dated November 13th, 1877, executed by the appellee to Mathias Wertz, administrator of the estate of Jacob Wertz, for \$3,081.80, the appellee's share in full of the estate of Jacob Wertz. It is insisted by the appellant that the court erred in admitting this receipt in evidence. Mathias Wertz, the administrator of Jacob Wertz, testified as follows:

"George Mullendore told me that Clint was worthless; to get some of the boys to take the note and wait on him as long as possible; he first wanted me to take it; I could not; I afterward told him John" (the appellee) "would take it; after I was appointed administrator, he came to me and asked me what the amount of the note was; he said 'I will have the note to pay without doubt;' that Clint had put his property in his wife's name; and he wanted us to wait as long as possible; he wanted me to take it; I told John that George wanted him to take it, and persuaded John" (the appellee) "to take it; that George might as well have his money as anybody; that George would pay it; that George wanted as much time as possible; I told George that if John would take the note, and receipt to me for it, I could settle the estate; he said all right, to get him to take it; I told John if he would take the note and receipt to me for it, I would give it up to him; he afterward took the note and receipted for it." Witness shown receipt. "The amount of the note was included in this receipt; I gave the old note up to John."

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In view of this evidence, uncontradicted and unquestioned, the admission of the receipt, if immaterial, could not operate to the prejudice of the appellant. The receipt tended to prove, in connection with the testimony of Mathias Wertz, that the appellee had taken the note held by his father as a part of his distributive share in his father's estate. It proved that he had executed a receipt, as he had agreed to do. Every fact which it tended to prove was testified to by Mathias Wertz. There was no available error in the admission of the receipt.

The appellant also objects to the following instruction, given to the jury by the court: "If you find that such an agreement existed," (that set up in the answer) "and was duly consummated by the payment of the consideration mentioned in the answer, and the time was extended to a time certain, without the consent of George Mullendore, then this would operate as a release of the surety, provided that, at the time such contract was made, and the consideration for the extension secured, the plaintiff knew that George Mullendore was surety only; but, if the plaintiff did not know the fact at the time, it would not operate as a release."

We think there was no error in giving this instruction. It stated the law correctly. *Davenport v. King, supra*, and cases there cited. The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be in all things affirmed, at the costs of the appellant.

Strong *et al.* v. The State, *ex rel.* Colvin, Trustee.

No. 7186.

STRONG ET AL. v. THE STATE, EX REL. COLVIN, TRUSTEE.

TOWNSHIP TRUSTEE.—*Action on Bond.—Civil and School Township.—Pleading.—Practice.—Amendment.—Misjoinder of Causes of Action.*—Where the original complaint in an action by a township trustee against his predecessor in office, upon his bond, sought only to recover money due the civil township, the subsequent filing of an additional paragraph of complaint, seeking to also recover money alleged to be due the school township, is a proper amendment, and does not amount to a misjoinder of separate causes of action.

SAME.—*Report.—Surety Not Bound Thereby.*—In such action the reformation of the report of the alleged defaulting trustee is not necessary to enable the sureties on his bond to avail themselves of any error therein prejudicial to their rights as such sureties.

From the Harrison Circuit Court.

B. P. Douglass and S. M. Stockslager, for appellants.

L. Jordan, W. T. Jones and S. J. Wright, for appellee.

NIBLACK, J.—This was an action by the State, on the relation of John H. Colvin, trustee of Taylor township in Harrison county, against Thomas Strong, a former trustee of that township, as principal, and Thompson Brown and Benjamin P. Douglass, as sureties, on the official bond of Strong as such trustee. Before issues were formed upon the complaint, Brown died, and the name of Margaret Brown, as his administratrix, was substituted in his stead.

The complaint was in two paragraphs. The first charged Strong with having received and having failed to pay over certain funds belonging to Taylor township, known as township funds.

The second charged that Strong had received and failed to account for certain school funds belonging to Taylor School Township, of which the relator was *ex officio*, also, trustee.

These two paragraphs comprised what was denominated the substituted or amended complaint in the action upon which the cause was tried. Upon the filing of the substituted complaint, the defendants raised the question of the

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right of the relator to file the second paragraph, upon the theory that the original complaint was only for the recovery of funds belonging to the township under its ordinary municipal organization, sometimes known as the civil township, and that the filing of such second paragraph brought a new, incongruous and incompatible element into the case, amounting to an improper joinder of two distinct causes of action, but the court overruled the objection to the filing of that paragraph thus urged by the defendants.

The defendants then answered in several paragraphs. The sureties also filed a cross complaint, demanding the reformation of a report made by Strong during his term of office. A demurrer was sustained to the cross complaint, and, upon issues joined, the court tried the cause, finding that there were certain sums due the relator, as trustee of the civil township, under the first paragraph of the complaint, and that there were certain other larger sums due to him, as school trustee, under the second paragraph. Motions for a new trial and in arrest of judgment being first severally overruled, judgment was rendered in accordance with the findings. The defendants also objected, in different forms, to the rendition of any judgment upon the findings of the court, upon the same theory that they opposed the filing of the second paragraph of the substituted complaint.

Questions are either made, or attempted to be made, here:

1st. Upon the filing of second paragraph of the substituted complaint;

2d. Upon the sustaining of the demurrer to the cross complaint;

3d. Upon the refusal of the court to grant a new trial;

4th. Upon the overruling of the motion in arrest of judgment;

5th. Upon the rendition of the judgment, over the objections of the defendants, the appellants here.

The original complaint is not in the record. We have,

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therefore, nothing before us showing that the second paragraph of the new complaint brought any new element into the cause. Conceding, however, that the original complaint was only for the recovery of money claimed to be due to the civil township, the addition of a paragraph, seeking, also, to recover money alleged to be due the school township, was a proper amendment, and did not, in any sense, amount to a misjoinder of distinct causes of action.

The propriety of such an amendment is, in legal effect, fully recognized by the case of *Steinmetz v. The State, ex rel.*, 47 Ind. 465, a case of accepted authority in this court. See, also, *Robinson v. The State, ex rel.*, 60 Ind. 26; *Inglis v. The State, ex rel.*, 61 Ind. 212.

No exception was reserved to the decision of the court sustaining the demurrer to the cross complaint; hence no question arises in this court upon that decision. Besides, upon the ruling in the case of *Ohning v. The City of Evansville*, 66 Ind. 59, the reformation of the report of Strong, as trustee, sought to be accomplished by the cross complaint, was not necessary to enable the sureties to avail themselves of any error existing in that report, prejudicial to their rights as such sureties.

The appellants have submitted no argument in support of any of the causes assigned for a new trial. Their objection, therefore, to the refusal of the court to grant a new trial is, under our practice, impliedly waived.

The only argument adduced in favor of the motion in arrest of judgment is addressed to the second paragraph of the complaint, and nothing is presented against the complaint, as a whole, upon the sufficiency of the facts stated in it. We are consequently justified in assuming, as we do, that the court correctly overruled the motion in arrest.

The objections urged against the rendition of the judgment were all based, in some way, upon the same theory as that upon which the appellants opposed the filing of the

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second paragraph of the complaint—that is, upon the alleged misjoinder of separate causes of action. What we have said, therefore, in regard to the propriety of permitting that paragraph to be filed, is sufficient to sustain the judgment rendered by the court upon its findings under both paragraphs of the complaint.

The judgment is affirmed, with costs.

No. 8072.

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75	443
124	354
127	573
75	443
128	64
75	443
141	413

PARTITION.—Mortgage.—Reformation and Foreclosure.—In a proceeding for partition, a mortgagee defendant may by counter-claim procure the reformation of his mortgage and a foreclosure.

SAME.—Answer of Judgment on Note no Defence.—In such case, an answer that a judgment on the note secured by the mortgage is in full force constitutes no defence, to bar foreclosure.

SAME.—Incorrect Description of Lands Intended to be Mortgaged.—When an incorrect description of lands intended to be mortgaged is carried into the judgment, order of sale, notice and sheriff's deed, such proceedings can not be corrected, either at the instance of the mortgagee or the purchaser at such sale.

SAME.—Correction by Reforming and Foreclosing Mortgage.—Such mistake may be corrected by reforming the mortgage and foreclosing it as reformed. *Rogers v. Abbott*, 37 Ind. 138; *Miller v. Kolb*, 47 Ind. 220; and *Angle v. Speer*, 66 Ind. 488, distinguished.

MORTGAGE.—Mutual Mistake.—Merger.—Res Adjudicata.—Judgment not a Bar.—Where a mortgage, by mutual mistake, contained an erroneous description of the land intended to be mortgaged, and the subsequent proceedings, including the sheriff's deed, contained the same mistake, the mortgage was not thereby so merged in the judgment as to make the question of description one of *res adjudicata*; but the mortgage may be foreclosed notwithstanding such judgment.

SAME.—Proceeding Nugatory.—In such case, the whole proceeding is infected by the original mistake, and is baseless, unsubstantial and nugatory, and is no obstacle to the reformation and foreclosure of the mortgage.

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PRACTICE.—Pleading.—Bad Paragraph of Answer.—Overruling Demurrer Substantial Error.—Judgment Must Appear to be not on Bad Paragraph.—Overruling a demurrer to a bad paragraph of answer adjudges that proof of the facts is sufficient to bar the action, and is substantial error, when it does not affirmatively appear that the judgment was not rendered on the paragraph in question.

From the Decatur Circuit Court.

G. Durbin, C. Ewing and J. K. Ewing, for appellant.
J. D. Miller, F. E. Gavin, J. S. Scobey and A. H. Fisher,
for appellees.

BEST, C.—The appellee Anthony W. Mericles brought this suit against his co-appellees Nancy Mericles, John A. Maddux, Amos Rodgers, James W. Rodgers, James W. Anderson, William Pruitt and the appellant, for the partition of a tract of land, alleging in his complaint that he owned the three-eighths, his wife Nancy one-fourth, John A. Maddux one-fourth, Amos Rodgers one-eighth, and that James W. Rodgers claimed an interest in the land. He further averred that the appellant had sold the interest of Maddux to him, and, in conveying it to him, had made him a deed which purported to convey him three-fourths of the land; that Maddux, to secure the payment of the purchase-money, had executed to appellant a mortgage upon two-thirds of the land, and had subsequently executed mortgages to Pruitt and Anderson upon the whole of the premises, all of which were duly recorded; that each claimed that his mortgage was a lien upon the land embraced in it, and each was made a party to limit his lien to the interest of Maddux. It was further averred that the land was indivisible, and the appointment of a commissioner to sell it was prayed.

The appellant appeared, filed a counter-claim, in which he alleged, in substance, that the appellees Anthony W. and Nancy Mericles, his wife, on the 26th of April, 1863, executed to one William Yost a mortgage upon the undivided one-half of said land, to secure the payment of a note of

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\$400 of even date, due one year thereafter; that Yost afterward endorsed the note, which is due and remains unpaid, to the appellant; that, in writing the mortgage, the word "eight," by the mutual mistake of the parties, was written instead of the word "nine," after the words "range No.," so that the land was described as in range "eight," when it was, in fact, in range "nine," and was intended to be so described. Prayer for a reformation of the mortgage, and, when reformed, that it be paid out of one-half of the proceeds arising from the sale of the land.

Anthony W. and Nancy Mericles each filed an answer of three paragraphs to this counter-claim. The first paragraph of each was a general denial, which were subsequently withdrawn. A demurrer was sustained to the second paragraph of the answer of Nancy, and a demurrer, for want of sufficient facts, was overruled to the second and third paragraphs of the answer of Anthony W., and to the third paragraph of the answer of Nancy. An exception was reserved to these rulings, and the appellant, declining to further plead, the cause was submitted to the court for trial, and final judgment was rendered for the appellees. From this judgment the appellant appeals, and assigns as error the order of the court in overruling the demurrer to each paragraph of the answers.

The second paragraph of the answer of Anthony W. Mericles averred, in substance, that, after the note mentioned in appellant's counter-claim had been endorsed to appellant, he, on the 2d day of March, 1865, recovered a judgment on said note, in the common pleas court of Decatur county, for \$420.20 and costs of suit, against the plaintiff, Anthony, and that such judgment was duly rendered, and was never reversed or set aside.

This answer constituted no defence, and the demurrer should have been sustained to it. The appellant, by his counter-claim, sought to foreclose his mortgage, and it is

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well settled that the recovery of a judgment upon a note secured by a mortgage is no bar to an action to foreclose the mortgage. *O'Leary v. Snediker*, 16 Ind. 404; *Jenkinson v. Ewing*, 17 Ind. 505.

The appellees insist that, as proof of the facts averred in this paragraph was admissible under the third paragraph of the answer, no error was committed in overruling the demurrer. This is the rule when a demurrer is sustained to a good paragraph of an answer, and there is another under which proof of the facts is admissible, but it is not the rule when a demurrer is overruled to a bad paragraph, as the ruling upon the demurrer adjudges that proof of the facts averred is sufficient to bar the action. *Over v. Shannon*, *ante*, p. 352. It does not appear that the judgment was not rendered upon the paragraph in question, and therefore we can not say that the appellant was not injured by the ruling. *Kimble v. Christie*, 55 Ind. 140.

The third paragraphs of the answers were alike, and in each it was averred, in substance, that on the 24th of January, 1865, the appellant instituted an action in the common pleas court of Decatur county against the appellees Anthony W. and Nancy Mericles, to foreclose the mortgage declared upon in the counter-claim, and on the 2d day of March, 1865, obtained a judgment foreclosing the mortgage by the description contained therein; that afterward, upon an order of sale, the land was sold by the sheriff, purchased by the appellant, and, after the expiration of a year from the sale, the appellant received a sheriff's deed therefor; that the description contained in the mortgage was carried into the judgment, the order of sale, the advertisement and the sheriff's deed, and concludes by insisting that the appellant "is estopped to claim that the description of the premises in the mortgage is erroneous."

These paragraphs are affirmative in their character. They admit, as we construe them, that there was a mistake in the

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description of the premises intended to be embraced in the mortgage, and that the sum secured thereby is unpaid, but attempt to escape liability thereon by alleging that the mortgage has already been foreclosed. In support of these paragraphs, it is insisted that the foreclosure of the mortgage by such erroneous description merges the mortgage in the judgment, and precludes the appellant from reforming the mortgage and foreclosing it as reformed. It is also suggested that, for aught that appears in the record, the appellees may have owned the land actually described in the mortgage; and appellant may have acquired title to, and be in possession of, it under his purchase. This may be true, but the court can not infer such facts for the purpose of aiding the pleading. It was incumbent upon the appellees to have alleged the existence of these facts. Had such paragraphs contained such averments, they would not only have shown a merger of the mortgage, but a satisfaction of the debt. As they did not, all that was shown was a merger of the mortgage, and the question arises whether such merger prevents the appellant from reforming his mortgage and foreclosing it as reformed? The appellees insist that it does, and the cases of *Rogers v. Abbott*, 37 Ind. 138, *Miller v. Kolb*, 47 Ind. 220, and *Angle v. Speer*, 66 Ind. 488, are relied upon to support them. We do not think the cases decide the question. In the case of *Rogers v. Abbott*, the appellant sought to recover land through a judicial sale. The judgment, notice of sale and sheriff's deed, by mistake, did not describe the land intended to be sold and sought to be recovered, but a different parcel; and the appellant sought to correct these mistakes, and to recover the land. It was held that these mistakes could not be corrected.

In *Miller v. Kolb*, the appellee had executed two mortgages, in each of which the land intended to be mortgaged was misdescribed. The mortgages were foreclosed and the property purchased by the appellant at sheriff's sale. The

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erroneous description was carried into the judgment, order of sale, notice and sheriff's deed, and the action was brought to correct the mistake in the description of the premises in such proceedings. It was held that such correction could not be made. In *Angle v. Speer* the same question arose, and was decided in the same way.

These cases establish the proposition, that when an incorrect description of lands intended to be embraced in a mortgage is carried into the judgment, order of sale, notice and sheriff's deed, such proceedings can not be corrected either at the instance of the mortgagee or the purchaser at such sale, but they do not decide that such mistake can not be corrected by reforming the mortgage and foreclosing it as reformed. No one of these cases was an action to reform and foreclose the mortgage, nor was such question raised or decided. Each was an action to recover the land through such proceedings, and to make them available it was sought to correct the mistakes. The appellant does not seek to recover the property, nor to correct the mistake in such foreclosure proceedings ; but, ignoring such proceedings, he seeks to reform and foreclose his mortgage. This he may do unless its previous foreclosure prevents him. Such foreclosure was by the erroneous description—was, in fact, upon a different parcel of land, one that was not, in fact, mortgaged nor intended to be mortgaged, and was therefore a mere nullity. The mortgage, as reformed, is a different instrument, embraces a different parcel of land, and one against which no foreclosure has been had. The judgment of foreclosure upon the land described did not adjudge that the land in dispute was not mortgaged by such instrument, and omitted therefrom by mistake, and, therefore, “the question of description” is not *res adjudicata*, nor does such judgment form any obstacle to the reformation and foreclosure of the mortgage. This view is not unsupported by authority.

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In the case of *Davenport v. Sovil*, 6 Ohio St. 459, the latter, during his life, executed to the former a mortgage upon the north-east quarter of a certain section of land, and, by mistake, described it as the north-west quarter of said section. The mortgage was foreclosed by such erroneous description, and the land was purchased by and conveyed to the mortgagee. Afterward the mortgagee brought an action against the widow and heirs of the mortgagor to correct the mistake in the mortgage, and to enforce the same as reformed. This was resisted on the ground that the mortgage was merged in the judgment, and that the sale of the land described in the mortgage satisfied the debt. The court said: "Here was a total mistake in the description of the land intended to be mortgaged. The mortgage was intended to embrace premises which the mortgagor did own, but, by mutual mistake, it described only a parcel of land which the mortgagor never did own, and to which he never had, or pretended to have any claim. * * * Let the mortgage be reformed, and made to conform to the intention of the parties. How then stands the case? The reformed mortgage is not merged in any decree, for there is no decree for the sale of any premises described in the mortgage, as corrected and reformed. The decree may be satisfied, at least *pro tanto*, to the amount of the sale; but the decree was based on the mistaken, and not the true, mortgage; the sale was of land not embraced in the true mortgage; no money, or other valuable thing was ever received by the plaintiff; the whole proceeding is infected by the original mistake, and is, therefore, baseless, unsubstantial, and nugatory. * * * We are of opinion, therefore, that the decree and sale under the mistaken mortgage, constitute no just obstacle to the plaintiff's relief; especially as he will, by the record of this case, be forever estopped from claiming any title to the premises purchased under the decree."

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In *Strang v. Beach*, 11 Ohio St. 283, Nickles executed a mortgage to Beach, and by mistake misdescribed the land. The mortgage was foreclosed by such description, and Beach became the purchaser. Afterward Strang sued Nickles, attached the land, and obtained an order to sell it as the property of Nickles. In an action by Strang to remove the cloud created by Beach's mortgage, the latter filed a cross petition to reform and enforce his mortgage against the land, and it was held that the facts stated entitled Beach to a reformation of his mortgage against the mortgagor and Strang, his creditor.

In the case of *State Bank, etc., v. Abbott*, 20 Wis. 599, a similar question arose, and was decided in the same way. A mortgage was foreclosed, without making the mortgagor's vendee a party, and was bid off by the assignee of the mortgagee for the full amount of the claim. An action was then brought to foreclose the mortgage against such vendee, and the court held that such action could be maintained, saying that the foreclosure proceedings in the former action "were nugatory and fruitless," and added: "A party may not be allowed to proceed vexatiously; but if, through mistake or the want of proper parties, the first action proves ineffectual, we know of no rule which will prevent the institution of a second, provided the plaintiff pays his own costs in the first."

These cases, it seems to us, are decisive of the question under discussion, and as they are in consonance with our sense of justice, we feel like following them. The appellant, by his purchase, took nothing, and as he can not correct the proceedings and thus recover the land, if he can not reform and foreclose his mortgage, he is without remedy, having lost his claim by an inadvertent mistake. This result should not be allowed unless the inexorable rules of law require it. They do not, and, therefore, he is entitled to the relief sought.

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For these reasons the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed, at the costs of the appellees Anthony W. and Nancy Mericles, with instructions to sustain the demurrer to the second and third paragraphs of each answer to the counter-claim, and for further proceedings.

75	451
130	467
75	451
142	563
75	451
145	35

No. 8087.

BAKER v. POTTMAYER ET AL.

INJUNCTION.—Good-Will.—Obligation not to Engage in Business Sold or Aid Others.—Breach.—Remedy.—Where P. sold his business to B. and C., and obligated himself to them, or either of them, never again to engage in the business in L., or to aid, encourage, or advise others so engaged, and C., having sold all his interest in the contract to B., engaged in the business in L., and was aided, encouraged and advised by P., adequate damages can not be estimated for the breach of such covenant, and consequently injunction was B.'s proper remedy against both P. and C., the one from giving, and the other from receiving, the aid.

SAME.—In such case, the business being packing and selling ice, a finding that ice was packed by C. with the aid of P., but not for the purpose of selling in L., would not entitle B. to judgment.

SAME.—Leasing Premises.—Preference.—In such case, a lease of his ice-houses to C. by P. would not be such a breach of his covenant to give B. and C. the preference, as to entitle B. to an injunction, C. not being under any obligation to keep out of the ice business on his own account.

SAME.—Exclusion from Possession.—Forcible Entry and Detainer.—If, in such case, P., colluding with C., broke in and violently excluded B. from possession, an action for forcible entry and detainer would have afforded B. appropriate and prompt relief.

SAME.—Refusal to Accept Renewal of Lease.—Waiver of Preference.—In such case, if B. refused to accept a renewal of his lease, at a price named, his consent was not necessary to the legality of a lease thereafter made, on the same terms, to another, notwithstanding his right of preference.

From the Cass Superior Court.

Baker v. Pottmeyer et al.

M. Winfield and Q. A. Myers, for appellant.

H. C. Thornton, for appellees.

Woods, J.—Complaint in two paragraphs by the appellant, praying an injunction against the appellees. Each paragraph is based upon and alleges breaches of an agreement of the parties, of the tenor following, to wit:

“This agreement witnesseth that John Pottmeyer has this day sold and delivered to Patrick Campbell and John Baker the following property, to wit: One pair of black horses and harness now used on said team, one ice-wagon, all the ice now held and owned by said Pottmeyer in the ice-houses situate on his lot, No. 125 of the town of West Logan, and in the ice-house situate near the covered Eel river bridge, on the south side of Eel river, and the ice in the ice-house near the Forest mill-dam, and the ice in the ice-house near the Wabash dam; all the tools and appliances owned and used by said Pottmeyer in cutting, packing and delivering ice; also the ice-house owned by said Pottmeyer, situate near the Wabash dam, on the north side of the Wabash river, on land owned by Hamilton, and the ice-house owned by said Pottmeyer situate near the Forest mill-dam, on land owned by the city of Logansport; for which said property said Campbell and Baker agree to pay said Pottmeyer the sum of forty-one hundred dollars,” [in instalments here specified]. “Said Campbell and Baker are to have the use of all the aforesaid ice-houses, in which the aforesaid ice, hereby purchased, is stored and packed, free from rent from this time till December 1st, 1877, and the said Pottmeyer agrees to pay the ground rent on the said two ice-houses hereby purchased until December 1st, 1877; and the said Pottmeyer hereby binds and obligates himself to the said Campbell and Baker, or either of them, that he will never again, within the city of Logansport, in any manner, either pack, sell or deliver ice, except for his own family use, and he will never again, within the limits of said city, in any manner,

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enter into said business, and will never give any aid, encouragement or advice to any other person or persons, to pack, sell or deliver, or to enter into said business, in any manner ; and he will not do the aforesaid things either secretly or openly, or in his own or in the name of any other person or persons. And said Pottmeyer also binds himself that, after the present year, he will give the said Campbell and Baker the preference for renting all the said ice-houses owned by him, or which he may at any time own ; and he hereby agrees that he will never rent or lease, in any manner, and he will never sell any ice-house which he now owns, or may hereafter own, to any other person or persons for the purposes of packing or selling ice.

"Witness our hands and seals, this 7th day of April, 1877.

[Signed]

"JOHN POTTMAYER, [L. S.]

"PATRICK CAMPBELL, [L. S.]

"JOHN BAKER. [L. S.]"

The defendants each answered by a general denial. Trial by jury ; verdict for the defendants ; motions by the plaintiff for judgment in his favor on the answers to interrogatories, notwithstanding the general verdict, and for a new trial, overruled and exceptions saved ; judgment on the verdict. Numerous errors are asserted, and the questions are presented and discussed in a variety of forms ; but the merits of the case are involved in the instructions given and refused.

The court, of its own motion, stated the case and instructed the jury as follows :

"This action is brought to enjoin the defendants from selling ice within the city of Logansport. The complaint alleges that the defendant Pottmeyer, on the 7th day of April, 1877, entered into a written contract with the plaintiff and his co-defendant, Patrick Campbell, and each of them, that he would never thereafter, in the city of Logansport, either pack, sell or deliver ice, except for his own family use, and that he would never encourage or advise any

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other person or persons so to do, either in his own name or in the name of any other person ; and that he would never lease or sell any of the ice-houses he then owned or might thereafter own for such purpose ; that, on the 1st day of December, 1877, Campbell, the defendant, sold all his interest in the contract to the plaintiff ; that the defendants Pottmeyer and Campbell have colluded together in derogation of the plaintiff's rights, to enter into the same business in the city of Logansport, and are carrying on said business in the name of Campbell ; that Pottmeyer is not only interested, but is a partner in the business. These charges the defendants severally deny. The court gives you the following charges as to the law that shall govern you in forming your verdict :

“1st. It was not a violation of the contract of April 7th, 1877, for Pottmeyer to enter into a contract with the defendant Campbell, or in any manner to aid him to pack, sell or deliver ice within the city of Logansport, nor was it a violation of said contract to rent him the ice-houses named in that contract. The agreement of Pottmeyer, in that contract, was not to give such aid to any person or persons other than Campbell or Baker.

“2d. The contract between Campbell and Baker, of December 8th, 1878, does not change the right of Pottmeyer to aid Campbell or Baker in packing, selling or delivering ice in the city of Logansport, and the right of Pottmeyer to give such aid remained the same after making this agreement as before.

“3d. There is no evidence making a case against Campbell, and your verdict should be for him.

“4th. If you find that Pottmeyer, at the commencement of this action, was not engaged in packing, selling or delivering ice in the city of Logansport, either in his own name or in the name of the defendant Campbell, then your verdict should be for the defendant Pottmeyer.

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“5th. If you find that the defendant Campbell, after selling out to Baker, had no intention of going into the ice business again, and that Pottmeyer, desiring to go into said business, induced Campbell to permit him to use his name for that purpose, and that the packing, selling and delivering of the ice complained of was done in fact by Pottmeyer, but in the name of Campbell only, your finding should be against Pottmeyer.”

At the request of the appellant the court gave the following:

“1st. The sale and transfer by Campbell to Baker of all his right, title and interest to and in the contract of April 7th, 1877, with defendant Pottmeyer was valid, and gave the plaintiff the same rights thereunder that Campbell and Baker had before.”

But the court refused the following:

“2d. After such transfer by Campbell to Baker, Campbell bore the same relation to the contract as a stranger.

“3d. Under the contract of April 7th, 1877, the defendant Pottmeyer obligated himself not to lease the ice-houses for the purpose of packing ice to any one except to Campbell and Baker; and, after the transfer by Campbell to Baker of his interest in the contract, Pottmeyer could not legally lease said houses for the purpose of packing ice to Campbell without the consent of Baker.

“5th. If Campbell, after the transfer of his interest in the contract to Baker, without the consent of Baker, obtained a lease of the ice-houses for the purpose of packing ice, and, before the commencement of this suit, had commenced to fill such ice-houses with ice to be retailed in Logansport, such action upon his part is illegal, and your verdict should be for the plaintiff as against him.”

6th. (In substance.) Under the contract of April 7th, 1877, Pottmeyer had no right to lease the ice-houses therein named to any other person or persons than Campbell and Baker, for the purpose of packing ice; and, if Campbell transferred

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his interest in the contract to Baker, Baker became possessed of all the rights against Pottmeyer which Campbell and Baker theretofore had, and if, without Baker's consent, Pottmeyer leased said ice-houses to Campbell for the purpose of packing ice for retail in Logansport, and Pottmeyer was encouraging and aiding him with labor, money and advice, you should find for the plaintiff.

7th. (In substance.) If Campbell assigned his interest in the contract to the plaintiff, thereafter Pottmeyer could not lawfully form a partnership with Campbell to engage in the ice business in said city, and use the ice-houses named in the contract for that purpose, without the consent of Baker, and if such partnership was formed, and the firm, before the commencement of this action, had begun to cut and pack ice in said houses, for the purpose aforesaid and without Baker's consent, your verdict should be for the plaintiff as against Pottmeyer.

In further explanation, it is proper to state that there is no proof or claim that Campbell made any formal assignment or transfer, to Baker, of the contract of April 7th, 1877, but on the 8th day of December, 1878, Baker executed to Campbell an undertaking, wherein was a recital of the tenor following: "Whereas the said Patrick Campbell has this day sold to said John Baker all his right, title and interest in and to certain ice-houses, ice, tools, wagons, horses and all things necessary to carry on the business of packing and delivering ice, as described in an article of agreement, dated on the 7th day of April, 1877, signed by John Pottmeyer, Patrick Campbell and John Baker."

The terms used in this recital do not, of themselves, express a transfer of Campbell's interest in the contract, but only of his interest in the property described therein; but counsel for the appellant insist that the agreement of Pottmeyer not again to engage, or aid others, in the business, was not a contract personal to Campbell and Baker,

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but that it was so far incident to the property and business which it was designed to protect, that Campbell's surrender to the appellant of his right in the property and business carried with it the benefit and right in equity of said agreement. In support of this view are cited *Gompers v. Rochester*, 56 Pa. St. 194; *Guerand v. Dandelet*, 32 Md. 561; S. C., 3 Am. Rep. 164; *Dunlop v. Gregory*, 10 N. Y. 241. We need not decide upon this point. The conflict between the instructions given and those refused is not on the question whether Campbell had assigned his interest in Pottmeyer's covenants, but upon the meaning and effect of those covenants, assuming that Baker has the same right to enforce them, which, before or without the assignment, Campbell and Baker would have had.

We will first consider the case in reference to Campbell, in whose favor the court directed the jury to return a verdict. The principal ground, on which the appellant's claim for relief against him is based by counsel, is, that he took a lease, or pretended lease, of an ice-house, to the use of which, under the contract and the assignment thereof, the appellant had a preference, and which house the defendant Pottmeyer had broken into and wrested from the possession of the appellant for the purpose of turning it over to Campbell. We deem it clear that the appellant is not entitled to an injunction on this ground. It is not pretended that, after assigning to Baker, Campbell was under any obligation to keep out of the ice business on his own account. The appellant asked an instruction, that, by virtue of the assignment, Campbell became a stranger to the contract. If so, he was certainly free from any obligation on account of it. Counsel claim, however, that, by selling his interest to Baker, Campbell came under an implied covenant to respect the rights so transferred, and not to join with Pottmeyer in any breach or denial thereof, and that his acceptance of a lease of the ice-house was a breach of his obligation, which enti-

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tles the plaintiff to the relief prayed. If it were conceded that, by accepting such lease, Campbell had violated his own obligation, or had knowingly implicated himself in a violation of the contract by Pottmeyer, the right to an injunction does not follow. Upon his own theory, Baker had only a preference to a lease of the houses, and, as no fixed rental had been agreed upon, Pottmeyer might lawfully lease to Campbell, after offering to Baker a preference on equal terms; and, if the appellant rejected the lease, Campbell was not forbidden to accept it, though taking it for the purpose of carrying on the same business which the plaintiff was conducting. The entire ground for complaint, therefore, in this respect, is that a right of preference to the use of a particular ice-house had been denied. But, for the breach of a contract to lease such a property, ample remedy is afforded in an action for damages; and nothing is averred to make this case an exception, if such averment were possible. Indeed, if Pottmeyer, colluding with Campbell, broke in and violently excluded the plaintiff from possession, as it is alleged that he did, an action for forcible entry and detainer would have afforded the appellant appropriate as well as prompt relief.

There is another ground on which the court was justified in refusing to give the appellants' third, fifth and sixth instructions, which were directed against the validity of the lease to Campbell. They each assume that the lease could, under no circumstances, be lawfully made without Baker's consent. There was undisputed evidence in the case that Pottmeyer offered to renew the lease to the plaintiff, for a price named, but the plaintiff refused the terms, and then the lease was made to Campbell, nominally at least, on the same terms as were offered to the plaintiff; and, in answer to an interrogatory, the jury found that the lease so made to Campbell was not "a mere sham, made to cover Pottmeyer's interest in the ice business." If the plaintiff did in

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fact refuse to accept a renewal of his lease, his consent was not necessary to the legality of a lease thereafter made to another, notwithstanding his right of preference. The instructions ignored the evidence on this subject, and, for this reason, were properly refused.

Some claim is made that there was a partnership between Pottmeyer and Campbell in the use of the ice-houses and in the conduct of the proposed business. The seventh instruction asked was based on that supposition, and it is objected that the court failed to instruct the jury in reference to that theory of the case. The case turned, in this respect, wholly upon the question whether the lease to Campbell was a sham, put forward to conceal Pottmeyer's interest; and, as already shown, the jury answered specially that this was not so. Under the circumstances and proofs in the case, this is equivalent to a finding that there was no partnership. Counsel, however, insist that this finding was the result of misinstruction upon the law. "The court instructed," says the counsel, "that it was not wrong for Pottmeyer to lease to Campbell. If that were true, * * * the lease is valid, and not a sham. The answer is correct under the instruction." This is an utter confusion of ideas, of which it is not to be presumed the jury could have been guilty. Whether a contract was made in good faith, or as a sham to conceal the real purpose of the parties, is one thing; and whether that contract is invalid because of being in supposed conflict with some other and inconsistent obligation, is quite a different thing. The instruction has reference to the latter point only.

We are of the opinion, however, that the instructions, which the court gave of its own motion, are based upon a misconception of the legal effect of the contract into which the parties had entered. Pottmeyer had bound himself to "Campbell and Baker, or either of them," that he would

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not do the things named ; that is to say, he bound himself to both of them jointly, and to each of them severally. The phraseology was well calculated to accomplish the manifest and reasonable purposes of the parties, under any probable contingency which could happen. If Campbell and Baker should continue in the business jointly, the joint obligation was available ; if they separated, but each continued in the business, or either of them retired from the business, the other continuing therein, they each had a separate personal covenant, by which Pottmeyer was bound not to return to the business himself, nor to aid any other in the business. He could not, as against Campbell and Baker, aid any other person, nor either one of them, in a separate business hostile to that of the firm ; and as against either Campbell or Baker, yet engaged in the business, he could not help the other.

It follows, therefore, that Pottmeyer had no right, in any manner, to aid Campbell in instituting and prosecuting the hostile business ; and Campbell, being cognizant, as he necessarily was, that Pottmeyer had no right to give, he had no right to receive, that aid. From the nature of the case, just and adequate damages can not be estimated for the breach of such a covenant, and, consequently, injunction is the proper remedy. The plaintiff was entitled, on proof that Campbell was receiving the aid of Pottmeyer in prosecuting the business, in violation of the agreement, to an injunction against both of them, the one from giving, and the other from receiving, the aid.

The appellant moved for judgment on the answers to interrogatories, and insists that the court erred in overruling the motion. The ruling, however, was right. It is found that ice was packed by Campbell, with Pottmeyer's aid, but not that it was done for the purpose of selling in Logansport. It is found that Campbell assigned to Baker all his

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interest in the contract with Pottmeyer, dated April 7th, 1877, but what the terms of that contract were, or that it was the contract sued on, is not found.

The judgment is reversed, with instructions to grant a new trial.

No. 8121.

ROBINSON ET AL. v. SHATZLEY.

75 461
144 683

REPLEVIN.—Nominal Damages.—In an action for the recovery of personal property under section 128 of the code, where it is shown that the property was wrongfully taken and unlawfully detained, the plaintiff is entitled to recover nominal damages without proof of actual damages.

SAME.—Proof of Detention of Property.—It is not necessary, in order to maintain such action, for the plaintiff to prove that the property was detained by the defendant in the county where the action is brought. Such proof, if necessary in any case, is only required where the immediate possession of the property is demanded.

SAME.—Demand.—Where it is alleged and proved that the property was unlawfully taken and unlawfully detained, no demand before suit is necessary.

From the Jasper Circuit Court.

M. F. Chilcote, for appellants.

F. W. Babcock, for appellee.

MORRIS, C.—This action was brought by the appellee to recover the possession of a roan cow of the alleged value of \$25, one brown cow and heifer calf of the value of \$28, and one bull calf of the value of \$12. The complaint states that the plaintiff below was the owner, and entitled to the possession, of said property ; that the same had been wrongfully taken, and was unlawfully detained by the defendant Robinson, under color of a writ of attachment, issued out of the Jasper Circuit Court, in favor of the defendant Fendig, against

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the property of Charles Shatzley ; that the plaintiff estimates the value of the property at \$60.00. She demands judgment for the recovery of the possession of the property, and damages for its detention.

The defendants below answered the complaint by a general denial. The cause was submitted to a jury, who returned a verdict for the appellee. The appellants moved the court for a new trial. The motion was overruled, and judgment was rendered for the appellee. The defendants below appealed to this court, and have assigned the ruling of the court upon the motion for a new trial as error.

The evidence, which is properly in the record, tends to support the verdict. The appellee testified that the property belonged to her ; she states how she came by it, and swears that it was worth more than the jury found it to be worth. Another witness corroborates her statements. The testimony shows that the property was taken by the appellant Robinson on a writ of attachment, issued in favor of the appellant Fendig, against Charles Shatzley, as stated in the complaint, and that he and his co-defendant were informed, at the time he seized the property, that it belonged to the plaintiff.

The appellants insist that there was no proof that the appellee had sustained any damages by the taking and detention of the property, and that, as the jury found that she had sustained nominal damages to the extent of one cent, their motion for a new trial should have been sustained. We think otherwise. If the appellants wrongfully took and unlawfully detained her property, she was entitled to recover nominal damages without proof of actual damages. 1 Sedgwick Damages, 88. The appellants also insist that it was necessary for the appellee to prove, in order to maintain the action, that the property was detained by the appellants in Jasper county. Such proof, if necessary in any case, is only required where the immediate possession of the property is demanded. 2 R. S. 1876, p. 89. No order for the seizure of the property

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was demanded or issued in this case. The action was for the possession of the property under section 128 of the code. The appellants also insist that proof of a demand was necessary in this case, and that, as no such proof was made by the appellee, their motion for a new trial should have been sustained. As the property in this case was alleged and proven to have been wrongfully taken and unlawfully detained, no demand was necessary. *Robinson v. Skipworth*, 23 Ind. 311.

The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be, in all things, affirmed, at the costs of the appellants.

No. 7586.

BATES ET AL. v. THE STATE, EX REL. WIGGAM.

TRUST AND TRUSTEE.—*Trustee of Express Trust.*—**Bond.**—**Sureties.**—

Where, under the provisions of the act concerning trusts and powers, 1 R. S. 1876. p. 915. a bond might be required of a trustee of an express trust, and a bond is executed by the trustee, with sureties, with the approval of the county clerk, conditioned for the faithful performance of the duties of the trust, such bond is valid and binding upon the trustee and his sureties.

SAME.—**Action on Bond.**—**Penalty.**—**Damages.**—Where a bond required the trustee to put the trust fund at interest, and annually pay the accrued interest to the beneficiary, in an action on the bond by the beneficiary to recover the accrued interest on the trust fund, which had been converted and squandered by the trustee, it is error to assess a penalty of ten per cent. on the amount found due.

From the Scott Circuit Court.

W. K. Marshall and W. Trulock, for appellants.

C. L. Jewett, for appellee.

Howk, C. J.—This was a suit by the appellee's relator, Mary J. Wiggam, against the appellants Jacob Y. Bates and

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Samuel S. Crowe, administrator of the estate of Henry K. Wilson, deceased. The relator's complaint contained two paragraphs, each of which counted upon a bond, in the penal sum of four thousand dollars, executed on the 27th day of November, 1865, by one Hiram Wiggam, and the said Jacob Y. Bates and Henry K. Wilson, then in full life but since deceased, and conditioned that if the said Hiram Wiggam should faithfully discharge his duties as trustee, appointed under the will of Stephen W. Wiggam, deceased, according to law, then the bond should be void, else to remain in full force. The cause, having been put at issue, was tried by the court, and a finding was made for the relator in the sum of \$273.94; and over the appellants' motion for a new trial, and their exception saved, the court rendered judgment on its finding.

The first errors complained of by the appellants, in this court, are the decisions of the circuit court in overruling their joint and several demurrers to the relator's complaint, and to each paragraph thereof. The material facts alleged in each paragraph of the complaint were, in substance, as follows: On the 20th day of December, 1859, Stephen W. Wiggam, then the husband of appellee's relatrix, died testate, at Scott county, Indiana, and without issue; and on the 22d day of December, 1859, the last will of said decedent was admitted to probate by the clerk of the court of common pleas of said county. In the fourth item of his will, the said testator provided, in substance, that, after the payment of his debts and the settlement of his estate, the residue of his estate should be converted into money and placed in the hands of Hiram Wiggam, as trustee, to be by him put at interest and the interest annually paid to the relatrix as long as she remained the testator's widow. On the final settlement of the testator's estate, there remained in the hands of his executors a balance of his estate amounting to \$1,978.39, to be disposed of as provided in the fourth item of his will;

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and thereupon Hiram Wiggam, having accepted the trust created in and by the testator's will, and for the purpose of qualifying as such trustee and to secure the relatrix, and the other beneficiaries named in the will, against loss resulting from his failure to discharge the duties of his trust, executed the bond in suit, with the said Jacob Y. Bates and Henry K. Wilson as sureties therein, which said bond was then and there approved by the clerk of said court of common pleas. Upon the execution and approval of said bond, the balance of said testator's estate was paid over by his executors to the said Hiram Wiggam, as such trustee, and he entered upon the discharge of the duties of his trust; and, since the testator's death, the relatrix had remained his widow and unmarried. In September, 1876, the trustee, Hiram Wiggam, died insolvent, leaving no estate for administration; and, by way of breach of the bond in suit, the relatrix averred that, prior to his death, the said Hiram Wiggam had converted to his own use the entire trust estate and interest received by him thereon to the amount of \$1,000.00, and had refused on demand to account for and pay over to the relatrix the said interest, or any part thereof.

The only objection urged by the appellants' learned counsel to the sufficiency of either paragraph of the complaint is, that the bond in suit was not authorized by any law of this State, in force at the time of its execution, and was therefore void. It is true, as claimed by the appellants' counsel, that, at the time the bond was executed, the act of June 17th, 1852, "concerning trusts and powers," which was the only law of this State then in force in relation to the subject, did not, in terms, require that the trustee of such a trust as the one under consideration should execute a bond with approved surety for the faithful discharge of the duties of his trust. 1 R. S. 1876, p. 915. But it is also true, we think, that the act in question clearly contemplated that such trustees should give bonds, with solvent sureties, for

Bates et al. v. The State, ex rel. Wiggam.

the faithful discharge of the duties of their trusts; for, in section 12 of that act, provision was made for the removal of any such trustees "of whose solvency or that of their *sureties* there is a reasonable doubt." I R. S. 1876, p. 916. In the case of *Thiebaud v. Dufour*, 54 Ind. 320, the question under consideration was carefully considered by the court, and the conclusion was reached that, under the provisions of the act of June 17th, 1852, the court having jurisdiction of an express trust might require the trustee of such trust to execute bond, with sufficient sureties, conditioned for the faithful performance of the duties of his trust, and the preservation of its funds. The case cited was approved and followed, on the point under consideration, in the more recent case of *Tucker v. The State, ex rel. Hart*, 72 Ind. 242. In the latter case, it was also decided that, where a bond might be required of the trustee of an express trust, he might, with sureties, voluntarily execute such bond, either in advance of or without an order of the proper court requiring its execution, and that such voluntary bond would be valid and binding on the trustee and his sureties. *Potter v. The State, ex rel.*, 23 Ind. 550.

In the case at bar, the court of common pleas of Scott county had jurisdiction of the trust created in and by the last will of Stephen W. Wiggam, deceased, and, under the statute, as we construe it, might have required the trustee, Hiram Wiggam, to execute the bond in suit. Indeed, from the fact, apparent in the record, that the bond sued upon was approved by the clerk of said court, on the day of its execution, it might be fairly inferred, as it seems to us, that the bond had been executed in compliance with a suggestion or requirement of the court. The appellants' objections to the sufficiency of the complaint were not well taken as to either paragraph thereof, and their demurrers thereto were correctly overruled.

The only other error assigned by the appellants is the

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decision of the circuit court in overruling their motion for a new trial. Under this alleged error the only point made by the appellants' counsel, in argument, is that the damages assessed by the court in favor of the relatrix were excessive. On the trial it was agreed by the parties, as evidence, that, at the date of the bond in suit, there remained in the hands of the trustee, Hiram Wiggam, only a balance of the trust fund amounting to the sum of \$678.39, and no more; and that, with the exception of that sum, the entire fund had been squandered and lost before the execution of the bond. It was further agreed, as evidence, that the trustee had annually paid the relatrix the interest on the trust fund "up to January 1st, 1873," and that no interest had been paid upon demand made therefor, "to the relatrix by said Hiram Wiggam, since January 1st, 1873; and, if the defendants were liable to pay any of the moneys arising from the fund in the hands of said Hiram Wiggam, such moneys were due and unpaid." It was also agreed, as evidence, "that Hiram Wiggam, the principal obligor in the bond sued on, the — day of September, 1876, died insolvent."

The record shows, that this action was commenced on the 10th day of October, 1877, at which time the annual interest on the balance of the trust fund of \$678.39, for four years ending on January 1st, 1877, was past due and unpaid. The cause was tried by the court and judgment rendered therein, on the 18th day of January, 1878, in favor of the relatrix and against the appellants, for the sum of \$273.94, the interest then due and unpaid on the said balance of said trust fund, with ten per centum damages thereon, making in the aggregate the sum of \$301.34. It is very clear, we think, and this much is conceded by the attorney of the relatrix, that the trial court erred in assessing damages or a penalty of ten per centum on the amount of its finding; for there is no law of this State, which authorized the assessment of such penalty or damages.

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, But the appellants' counsel also claim, that the court erred in its assessment of the amount of interest accrued on the trust fund and unpaid, at the time of the rendition of the judgment, because they say that this interest was computed by the court at the rate of ten per centum per annum. The record fails to show, as it seems to us, that this point is well taken. It is difficult to determine, from the evidence in the record, upon what basis the court, in its finding and judgment, computed the amount of interest due the relatrix on the balance of the trust fund, secured by the bond in suit, but we are well satisfied, that this interest was not computed at the rate of ten per centum per annum, for at that rate the sum found due the relatrix would have largely exceeded the amount assessed by the court in her favor. Under the evidence, we are of the opinion that we ought not to disturb the finding of the court, on account of the amount found due the relatrix, except as to the penalty or damages of ten per centum assessed in her favor. The testator's will, under which the trust was created, required the trustee to put the trust fund at interest and to annually pay the interest accrued thereon to the relatrix, and the bond in suit was executed by the appellants to secure the trustee's faithful discharge of this duty of his trust. During all the time covered by this suit, the trustee might have lawfully put the trust fund at interest by contract at the rate of ten per centum per annum ; but instead thereof the trustee apparently loaned the money to himself, converting the entire fund and interest to his own use, and died insolvent. Under these circumstances, it seems to us that it would not have been unfair or unreasonable to have charged him or his sureties with interest on the trust fund, at the rate of ten per centum per annum, although it is apparent from the amount of the finding that the court computed the interest at a much less rate than ten per cent. per annum.

The court erred, we think, in adding to the amount of in-

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terest found due the relatrix, by way of penalty or damages, the sum of twenty-seven dollars and forty cents. If, therefore, the appellee's relatrix will, within sixty days from this date, enter a *remittitur* of the twenty-seven dollars and forty cents assessed by the court in her favor, by way of penalty or damages, the judgment will be affirmed, and otherwise it will be reversed, but, in either event, at the costs of the appellee's relatrix.

No. 7765.

HUMPHREYS v. THE STATE, EX REL. SHERWOOD.

75 469
154 583

NEW TRIAL.—Practice.—Evidence.—Witness.—As a rule, a new trial will not be granted for the purpose of affording a party an opportunity to impeach a witness by newly-discovered evidence.

SAME.—Unless the newly-discovered evidence is of such materiality as to render it likely that it would produce a different result, a new trial should not be granted.

SAME.—Surprise.—Where the testimony of an adverse witness is such as was to be reasonably expected, a new trial should not be granted on the ground of surprise at such testimony.

From the Greene Circuit Court.

W. M. Franklin, A. G. Cavins and E. H. C. Cavins,
for appellant.

E. E. Rose, E. Short, J. C. Denny and W. L. Gran-
ger, for appellee.

ELLIOTT, J.—This was a prosecution against the appellant under the statute regulating proceedings in bastardy cases. There is but one error assigned, and that is based upon the ruling denying appellant a new trial. Like almost every case of this character, there was a sharp conflict in the evidence, but the jury, as juries very generally do in such cases, believed the testimony of the relatrix, and we can not say that they did wrong. This is all we need say upon the

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often argued, but very seldom tenable ground, that the verdict is not sustained by the evidence.

One of the grounds upon which a new trial was asked is that of newly-discovered evidence. It would serve no useful purpose to set forth the evidence claimed to have been newly-discovered. It is sufficient to say that it was not of such a character as would have authorized the granting of a new trial. The only effect of the newly-discovered evidence would have been to contradict the relatrix upon a matter of not very great materiality, namely, the precise date when one of several acts of sexual intercourse took place.

Conceding that the newly-discovered evidence would have impeached the relatrix upon this point, still appellant would not have been entitled to a new trial, for the rule is that a new trial will not be granted for the purpose of affording a party an opportunity to impeach a witness. The time at which one of the several acts of sexual intercourse took place was not of sufficient materiality to have entitled the appellant to a new trial. It was not at all likely that such evidence would have produced a different result upon a second trial. Unless evidence is of such materiality as to render it likely that it would produce a different result, a new trial should not be granted.

Another reason urged for a new trial is, that the appellant was surprised by testimony given by the relatrix. The testimony which caused the surprise, upon which appellant bases his motion, was as to the date on which one of the acts of illicit intercourse took place between the relatrix and the appellant, and was called out upon cross-examination. The matter thus testified to was not of a material character, and would not, if proved upon another trial, be at all likely to change the result. But, independently of this consideration, the cause shown for a new trial, upon the ground of surprise, was insufficient, because the appellant must have expected, from the character of the charge preferred, just such testi-

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mony as was given against him. Where the testimony of an adverse witness is such as was to be reasonably expected, there is no ground for a new trial. The argument upon this point rests upon a mistake of fact. The relatrix testified, in her examination before the justice, that the child was begotten on the 20th day of May, 1877, and this statement she reiterated in the trial in the circuit court. In the latter court she testified to three distinct acts of sexual intercourse, but did not, as we understand her testimony, directly contradict what she had said in her examination before the justice of the peace.

Judgment affirmed, at costs of appellant.

75	471
120	219
75	471
131	443
75	471
138	579
75	471
145	617

No. 7975.

ADAMS ET AL. v. LA ROSE ET AL.

75	471
160	113

ACTION TO QUIET TITLE.—Trust and Trustees.—Real Estate.—Tenants in Common.—Conveyance.—Sale on Foreclosure of Mortgage for Purchase-Money.—Lien of Trustee for Moneys Paid Out.—Where one held land conveyed to him for himself and as trustee for others, purchasing each an equal share, and, upon default of some, the mortgage for unpaid purchase-money was foreclosed, and the land, having been sold, was conveyed to the trustee by sheriff's deed, he acquired such a lien upon the share of a co-tenant in default as would authorize a decree quieting his title to such co-tenants' interest in the land, unless reimbursed *pro rata* the moneys paid for the latter, and interest thereon, within a time fixed by the court.

SAME.—Such trust was a naked trust, and the trustee, having paid his share of such purchase-money, was not guilty of a breach thereof in permitting the land to go to sale on a foreclosure of the mortgage securing the purchase-money.

PRACTICE.—Decree.—Objections to.—Bill of Exceptions.—Recitals not Evidence.—A bill of exceptions is necessary to show objections to the form or substance of a decree, or the grounds of objections and exceptions thereto. The recitals of the clerk following the entry of the decree are not evidence of such facts.

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From the Cass Circuit Court.

M. Winfield and Q. A. Myers, for appellants.

N. O. Ross, for appellees.

Woods, J.—Demurrer to the complaint overruled and exception ; demurrer to the cross complaint sustained and exception ; and, the defendants refusing to plead further, judgment given for the plaintiff.

The cross complaint states no material fact which is not stated in the complaint, a summary of which will be sufficient.

Error is assigned upon the rulings on the demurrsers, upon the overruling of a motion in arrest of judgment, upon the entering of judgment against George E. Adams, and upon the form of judgment, in that it gave the appellant sixty days in which to redeem.

The complaint shows that in May, 1869, Andrew H. Hamilton and his wife, Phebe A. Hamilton, conveyed to Samuel A. Hall certain described lands for the price of \$25,668.00, of which sum one-half was paid down, and for the remainder Hall gave to Andrew H. Hamilton his three several and equal promissory notes, payable in one, two and three years, with ten per cent. interest payable annually, and, to secure the payment thereof, executed to said Hamilton a mortgage on said lands. Hall purchased the lands for himself and for Charles B. Knowlton, David Dykeman, Willard G. Nash, William Schrier, and the appellant George E. Adams, each of whom paid one-sixth of the cash payment, and was to pay one-sixth of the sums evidenced by said notes, and to have one-sixth of the land. As a matter of convenience the title was taken in the name of Hall, who held for himself and in trust for the others. In April, 1870, Hall died testate, his will, which was duly probated, containing a declaration of said trust, and directing that a conveyance be made to each person entitled thereto of one-sixth of the land upon his payment of one-sixth of the purchase-money. In May, 1870, after Hall's death, a

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payment of \$5,561.40 was made on said notes to Hamilton, of which the parties each paid an equal share.

In May, 1872, Hall's executrix sold his interest, and made a conveyance of the lands to the appellee Noah S. La Rose, to be held by him for himself and in trust for the other owners. On the 8th day of December, 1875, Hamilton obtained a decree of foreclosure of his mortgage, and an order for the sale of the premises for the payment of the sum of \$7,582.81, to which decree the appellee La Rose, and the widow, legatees and heirs of said Hall, and they only, were made parties defendants. One-third of the amount of said decree was due respectively from the appellant Geo. E. Adams, and from said Knowlton and Dykeman each, La Rose and the other parties interested having paid their respective shares of the notes in full. A sale of the premises, by virtue of the decree, was made on the 11th day of November, 1876, to Andrew H. Hamilton for the sum of \$7,604. Six months thereafter, La Rose took from Hamilton an assignment of his certificate of purchase of said lands, paying therefor the sum of \$8,036, being \$50 more than the amount of the certificate and ten per cent. interest thereon, computed to the date of the assignment. The plaintiff afterward paid the taxes assessed against Adams' share of the land, and, on the 24th of July, 1877, gave Adams written notice of his purchase of the certificate, and of the amount required of Adams to redeem his portion, and that, in default of such redemption, he would take a sheriff's deed to himself and claim an absolute title thereunder; and, Adams having failed to redeem, on the 12th of November, 1877, La Rose took the sheriff's deed to himself. Though not a party to the foreclosure suit, Adams knew of its institution and pendency, and Hamilton, the plaintiff in that suit, knew, when he commenced the action, that Hall held the title under said trust for the benefit of Adams and the others named. The complaint concludes by

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charging that Adams claims title to one-sixth interest in the land, and that he had made a pretended conveyance thereof to his son and co-defendant Edward L. Adams, who claims an interest.

The prayer is, that the plaintiff's title be quieted; or if, in the judgment of the court, either of the defendants had an interest in the land, that there be an accounting and a finding of the amount which the defendants, or either of them, should pay the plaintiff to be entitled to a conveyance of one-sixth of the land, and that a time be fixed within which the payment should be made, etc.

The cross complaint claimed that the trustee had been guilty of a breach of trust in permitting the sheriff's sale to be made, and ended by praying an accounting of the amount which Adams had paid, and of the whole amount paid, on said land, and that a decree be made confirming to said Adams an interest in the land in proportion to the sums which he had paid, and that, for the purpose of a final and full adjustment, Knowlton, Dykeman, and others interested, be made parties.

The court, after ruling upon the demurrers as already stated, entered a decree quieting the title, but upon the condition and proviso, that the defendants might, within ninety days, pay to the plaintiff the sum of \$2,985.94, with interest to the day of payment at the rate of ten per centum per annum, and that, if such payment were made, the decree quieting the title should be void, and the undivided one-sixth of said lands should vest in said George E. Adams, and the plaintiff should make to him a conveyance of said interest by a proper deed without covenants.

It will be observed that ninety days were allowed to the appellants to redeem, instead of sixty, as stated in the assignment of error. But there is another and better reason why this assignment is not available. There is no bill of exceptions in the record, showing any objection to the form or substance

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of the decree, or the grounds of objection and exception if any were made. The recitals of the clerk following the entry of the decree, that objection was made, and exception taken, to the ruling thereon, are not evidence of the fact. There is, therefore, no question before us, either as to the form or substance of the decree. *Bayless v. Glenn*, 72 Ind. 5; *Douglass v. The State*, 72 Ind. 385; *Teal v. Spangler*, 72 Ind. 380. The point to be decided is, whether, upon the complaint, the plaintiff was entitled to any relief.

The trust under which Hall, and after him La Rose, held the land for Adams and the others, was a naked trust, and imposed no duty on the trustee which did not rest equally upon each of the *cestuis que trust*, and that was, to contribute his share towards the payment of the notes given for the purchase-money, as they should become due, and to the payment of taxes and other necessary expenses, if any were incurred. On the facts stated, it is therefore clear that La Rose was guilty of no breach of trust in permitting the property to go to sale upon the decree of foreclosure. It was the delinquency of Adams, Knowlton and Dykeman that made the sale possible.

In the deed made by Hall's executor to La Rose, whereby he became the holder of the title, the terms of the trust were fully and explicitly stated. By the 13th section of the act concerning trusts and powers, approved June 17th, 1852, it is provided that "A conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." 1 R. S. 1876, p. 916; *Gaylord v. Dodge*, 31 Ind. 41. If this statutory provision be deemed applicable, then the title conveyed to La Rose vested at once in all the parties interested, subject, of course, to the mortgage, and they became tenants in common of the land. The result of this would probably be that they were all necessary

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parties to the foreclosure suit, and that the decree was not binding on the interests of those who were not made parties. It is not necessary, however, that we decide whether the statute referred to is applicable, nor whether Adams, and the others interested with him, were necessary parties to the foreclosure. Whether they were strictly tenants in common, and each vested with the legal title to his respective share in the land, is not material here. Such, in equity, was their practical relation, and upon that relation arose their rights and duties towards each other under the facts which have been stated. In 1 Washburn on Real Property, 4th ed., p. 686, sec. 14, speaking of tenants in common, the author says: "The interests of all are so far identical, and each is so far regarded as acting for the others in regard to the estate, that, if there were an outstanding adverse title to any part of the estate, no one of them, before partition made, could, by purchasing it in, use it against his co-tenants if they were willing to contribute *pro rata* towards reimbursing him the moneys he may have had to pay to acquire such title. Equity would, in such case, restrain the use of such title adversely to his co-tenants. In making such purchase, he would be considered as acting as trustee for his co-tenants, until they should have disaffirmed the presumption by refusing to contribute."

Applying this doctrine to the case in hand, the conclusion to be reached is not difficult. Whether the foreclosure and sale be regarded as valid and effectual against Adams, or whether they be deemed to have been invalid because he was not a party, in either case, the appellee La Rose, by purchasing the certificate of sale, acquired a lien upon the land which he had a right to enforce against Adams' share therein, to the extent of his share of the unpaid mortgage debt. If the mortgage had not been foreclosed as against Adams, then La Rose became the owner of the mortgage as against him, and if the foreclosure was effective and valid against all interested, then, by the assignment of the certifi-

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cate and the subsequent receipt of the sheriff's deed, he became the owner of the legal title, subject to the right of his co-tenants to redeem ; and, in the one case, he was entitled to a decree of foreclosure against the defendants ; and, in the other case, to a decree substantially as rendered. If it ought to have been, and had been, a decree of foreclosure, the appellants, as a matter of course, would have had the benefit of the statutory right of redemption within one year from a sale made under the decree.

But whether the judgment ought to have been in one form or the other is, as already stated, a question which we are not called on to decide. The record does not present it.

The judgment is affirmed, with costs.

75	477
126	312
75	477
166	218

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No. 9736.

BURTON v. THE STATE.

CRIMINAL LAW.—Indictment.—Name.—Presumption.—Affidavit and Information.—The law presumes every man to have a christian name, unless the contrary appears, and, in an indictment or information against him, that name, as well as his surname, must be stated in full, unless some reason is shown for not so stating it; and a failure to state it, or a reason for not stating it, may be taken advantage of on motion to quash; but the court, on motion to quash or in arrest of judgment in a prosecution of a defendant under the name of "Ben," will presume that it was his true and full christian name.

SAME.—Discretion of Court to Appoint Attorney for Poor Person.—County Commissioners.—A person prosecuted for crime and unable to employ counsel for his defence is not entitled to have such counsel assigned him as he may choose, and the court in its discretion may decline to assign him the counsel he may desire, and assign him other counsel, and its action therein can not be error, unless there is, in the particular circumstances, an abuse of discretion; and where county commissioners have employed attorneys to defend poor persons charged with crime, though it may be they have no such authority, yet that is no reason why the court may not appoint an attorney thus employed.

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From the Montgomery Circuit Court.

T. E. Ballard and *M. E. Clodfelter*, for appellant.

D. P. Baldwin, Attorney General, *J. H. Burford*,
Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was prosecuted in the court below, by affidavit and information, for the larceny of a watch, and, upon trial, was convicted and sent to the State's prison.

The evidence is not in the record ; but two points are made for the reversal of the judgment, which may be considered without the evidence. Motions to quash and in arrest were made and overruled. The objection urged to the affidavit and information is, that in them the appellant is called Ben Burton. The assignment of errors is in the name of Benjamin Burton as appellant, but that does not change the aspect of the question as it was presented to the court below. The law presumes every man to have a christian name, unless the contrary appears, and, in an indictment or information against him, that name, as well as his surname, must be stated in full, unless some reason is shown for not so stating it ; and a failure to state it, or a reason for not stating it, may be taken advantage of on a motion to quash. *Gardner v. The State*, 4 Ind. 632 ; Moore's Criminal Law, p. 217. sec. 160. But it seems to us that Ben may have been the true and full christian name of the appellant. Ben is not necessarily a contraction of Benjamin, Benoni, Benedict, or any other name, and, on the motion to quash, the court, we think, was right in assuming that Ben may have been the full christian name of the appellant. The motions to quash and in arrest were properly overruled.

The appellant did, before pleading, in an incidental proceeding to have counsel assigned him; declare his christian name to be Benjamin, but no question is saved in the record as to the name in which the subsequent proceedings were carried on. See 2 R. S. 1876, pp. 398-9, secs. 99, 100.

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The appellant, at the proper time, applied to the court to assign him counsel to aid in the defence of the prosecution, on account of his inability to employ counsel. He showed to the court that he was unable to employ counsel, and that he had consulted with Messrs. Ballard & Clodfelter, attorneys of that court, and had communicated to them the facts and circumstances of the case, and that he had no means to employ counsel, and they had consented to act as his counsel, if the court should appoint them. He asked that they be appointed. It appeared, however, that the board of commissioners of the county had employed another firm of attorneys, practicing at the bar of that court—Messrs. Hurley & Crane—to attend to all county business, including the defence of the poor prosecuted in that court, when appointed by the court, at a fixed compensation per year.

The appellant objected to the appointment of Messrs. Hurley & Crane, saying he did not think they would do him justice, and desired the appointment of Messrs. Ballard & Clodfelter. But the court, in the language of the bill of exceptions, "having knowledge of said contract, in the exercise of its sound discretion, the said Hurley & Crane being attorneys in good standing and of experience at this bar, and the defendant giving no sufficient reason why they should not be appointed, appoints said Hurley & Crane to defend said Burton," etc. Accordingly Messrs. Hurley & Crane appeared for the defendant, and acted as his counsel until the return of the verdict, when Messrs. Ballard & Clodfelter appeared and filed the motions for a new trial and in arrest.

It is claimed that the court erred in not appointing Messrs. Ballard & Clodfelter to conduct the defendant's defence; but it seems to us to have been a matter resting in the discretion of the court, and we can not say that there was any abuse of that discretion. There is no rule of law that we are aware of, which entitles a person prosecuted for crime,

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and unable to employ counsel for his defence, to have such counsel assigned him as he may choose, however desirable it may be that his wishes in that respect should be consulted and gratified.

The court may in its discretion decline to assign him the counsel he may desire, and assign him other counsel; and its action in this respect can not be error, unless there is, in the particular circumstances, an abuse of discretion.

It may be that the board of county commissioners have no legal power or authority to employ counsel to defend persons charged with crime and having no means to employ counsel; but, if that is the case, it is no reason why the court may not appoint a person thus employed.

We find no error in the record.

The judgment below is affirmed, with costs.

No. 7943.

PENCE ET AL. v. MAKEPEACE.

DECEDENTS' ESTATES.—Action on Administrator's Bond to Recover Unpaid Judgment.—An action may be maintained on an administrator's bond to recover the amount of a judgment against the estate of his intestate, the estate being solvent, the judgment the only unpaid claim, and the administrator always having money in his hands to pay it.

SAME.—Answer.—Set-Off.—Note of Plaintiff.—In such case, an answer that the judgment plaintiff owes on a note to the intestate a larger amount, upon which he refuses to credit the amount of his judgment, is insufficient as an answer of set-off, or for any other purpose.

SAME.—Answer of Uncollected Claims.—In such case, an answer, that the estate is unsettled, has a large amount of claims uncollected, is solvent, and will be able to pay all claims against it, when the assets are fully realized upon, contains no defence.

SAME.—Evidence.—Order Book.—Admissions of Administrator.—On trial of such action, the plaintiff's judgment may be read in evidence from

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the order book, and where, besides it, there was the parol admission of the administrator that "there is enough money in my hands to pay this claim, independent of all other claims," the evidence fully sustained the finding for the plaintiff, and the finding was not contrary to law.

DEMAND.—Pleading.—Complaint.—Decedents' Estates.—Duty of Administrator to Pay Judgment.—The order in a judgment allowing a claim against a decedent's estate is sufficient to make it the duty of the administrator to pay it without a specific demand, if he has money in his hands, and no demand is necessary before bringing a suit on his bond to recover the amount.

From the Madison Circuit Court.

J. A. Harrison and E. P. Schlater, for appellants.

M. S. Robinson and J. W. Lovett, for appellee.

FRANKLIN, C.—On the 3d day of January, 1874, appellee recovered a judgment in the Madison County Circuit Court for \$342.46, against a former administrator of Allen Makepeace, deceased. On the 13th day of March, 1876, appellant John W. Pence was appointed administrator *de bonis non* of said estate, the former administrator thereof having resigned; and that said Pence, as principal, and John E. Corwin, Edgar Henderson and Nancy Makepeace, as his sureties, executed and filed in said court an administration bond in the sum of \$70,000; that this suit was commenced on said bond the 10th day of March, 1879.

The complaint is in the usual form upon an administrator's bond, and alleges that Nancy Makepeace had deceased before the bringing of the suit, and that there was no executor or administrator of her estate, but appellants John E. Corwin and Alvira J. Corwin were trustees, charged with the management and control of the estate, real and personal, of which she died seized. No question is made as to the capacity in which the trustees are sued. The alleged breach of the bond is the refusal and failure to pay appellee's judgment, the complaint averring that the estate was solvent, and that the administrator had had in his hands, all the time

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from his appointment to the bringing of this suit, sufficient money to pay appellee's judgment, it being the only unpaid claim against said estate.

Appellants demurred to complaint; demurrer overruled; answer in four paragraphs filed; demurrs by appellee to third and fourth paragraphs of answer; demurrs sustained; issues formed; trial by court; finding for appellee; motion for new trial overruled. To all of which rulings exceptions were properly taken, and judgment was given for appellee for \$450.29.

Appellants have assigned, in this court, for errors:

- 1st. The overruling of the demurrer to the complaint;
- 2d. Sustaining the demurrer to the third paragraph of answer;
- 3d. Sustaining demurrer to fourth paragraph of answer;
- 4th. Overruling motion for a new trial.

The objections urged against the complaint are, that it contains no averment of a specific demand for payment, and that a general demand, refusal and neglect to pay, do not constitute a sufficient breach of the bond; that, in order to constitute a good breach, the complaint should show a failure to comply with some specific order of the court to pay the money.

Under section 108, 2 R. S. 1876, p. 534, when the estate was clearly solvent, it was the duty of the administrator to pay the debts against the estate, in the order provided for in the succeeding section, as fast as the money of the estate came into his hands. And "in cases where it is the duty of a party, by contract or otherwise, to remit or apply money in his hands without a demand, no demand is necessary before suit." *Catterlin v. Somerville*, 22 Ind. 482; *Walrath v. Thompson*, 6 Hill, 540; *Stacy v. Graham*, 14 N. Y. 492.

The cases of *Jones v. Gregg*, 17 Ind. 84; *Bougher v. Scobey*, 23 Ind. 583 and *Heddens v. Younglove, Massey &*

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Co., 46 Ind. 212, are in relation to agencies, and not applicable to this case. The cases referred to, of *Voris v. The State, ex rel.*, 47 Ind. 345, and *Shook v. The State, ex rel.*, 53 Ind. 403, we think, are against, instead of being in favor of, appellants' objection. It was the duty of the administrator to pay appellee's judgment when he had the money in his hands, instead of paying it out on the distributive shares of the heirs, and it was a breach of his duty not to do so. The judgment contained a specific order of the court for him to pay it. We think no demand was necessary before bringing suit in this case, and that the complaint alleged a sufficient breach of the bond. There was no error in overruling the demurrer to the complaint.

The third and fourth paragraphs of the answer read as follows:

"3d. And for further answer said defendants say that said alleged claim of the plaintiff is not a judgment of the court constituting any lien on decedent's estate, but an allowance made by the court, for a debt owing by decedent at his death to, and filed by, plaintiff against said estate, for a demand having no priority over any other demands, but that said debt is in the class of general debts, and not otherwise. That, in fact, said estate was not then liable to pay said demand to plaintiff then or ever since, because said plaintiff was indebted to defendant in a much larger sum, to wit, \$716, on a note, which he, the plaintiff, failed and refused to pay and never has paid, nor would plaintiff permit it to be credited on his note, though often requested by said administrator, and, if he would have done so, his demand would have been more than paid, and should have been surrendered." This is entirely insufficient as an answer of set-off, or for any other purpose.

"4th. And further answering said defendants say that the estate of Allen Makepeace, deceased, is still pending in this court, and is an unsettled estate. That there are a large

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amount of claims due said estate, which remain uncollected and are in process of collection, and that said estate is fully solvent, and will be able to pay off and discharge all of the claims existing against it, when the assets of the same are fully realized upon. Wherefore plaintiff is not entitled to recover on said bond as prayed for."

We do not know what to call this paragraph, and can not imagine any effect to be given to it in this suit. We see no error in sustaining the demurrs to the third and fourth paragraphs of the answer.

The last complained of as error was the overruling of the motion for a new trial.

The reasons assigned in the motion were :

- 1st. The finding was contrary to law ;
- 2d. The finding was not sustained by the evidence ;
- 3d. Overruling demurrer to complaint ;
- 4th. Sustaining demurrer to 3d paragraph of answer ;
- 5th. Sustaining demurrer to 4th paragraph of answer ;
- 6th. In admitting testimony over defendants' objection.

The testimony objected to was the reading in evidence, from the order book of that court, appellee's judgment. This was competent and entirely proper, in order to establish the amount of appellee's claim. The rulings upon the demurrs were not causes for a new trial.

After the giving of the bond in evidence, the appellant Pence was the only witness examined, and that gave any parol testimony. He testified that about a year before that he had sold a note and mortgage on Allen L. Makepeace to the bank for about \$800, and before that he had sold other notes to the bank for over \$3,225 ; that he had had on hands, in money belonging to the estate, ever since he was administrator, between \$800 and \$900, and had that much at that time.

The following question was asked by the court : "Are you claiming that there is not the necessary amount in your hands to pay the debts off?"

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Ans. "I claim there is ; I am admitting that ; I admit there is enough money in my hands to pay this claim, independent of all other claims."

The foregoing is substantially all the testimony given in the case. The evidence fully sustains the finding of the court, and therefore the finding is not contrary to law.

We might be permitted to remark here, that while the parties may have had a controversy over crediting appellee's judgment upon a note held by the administrator, yet after the administrator had sold the note, and got the money for it, he ought to have paid the judgment, to enable appellee to pay a like amount upon the note in the hands of the assignee, and his failure to do so was a full justification for the bringing of this action. We think substantial justice has been done in this case, and a new trial should not be granted.

The judgment ought to be affirmed, with damages.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, with ten per cent. damages and with costs.

No. 7769.

SCHENCK v. SITHOFF.

PERSONAL PROPERTY.—Action to Recover Possession.—Bill of Sale.—Demand.—Evidence.—A demand for possession of personal property claimed under a bill of sale is sufficiently proved by evidence of the agent making the demand, and of the defendant that it was his first knowledge of plaintiff's claim of ownership before action brought to recover its possession.

SAME.—Bill of Sale.—Consideration.—Instruction.—Gift.—On trial of an action to recover possession of such personal property, an instruction, asked and refused, that, "If the jury shall find that the bill of sale was made without any actual consideration as between them, the plaintiff

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is not entitled to recover the possession of the property described in the bill of sale," was not fully correct. In such case, if the bill of sale was without consideration, evidence having been introduced tending to show a perfect gift, by delivery of possession under it, to the plaintiff, an action would lie to recover possession.

SAME.—*Consideration.—Payment.*—In such case, an instruction, assuming that the price mentioned in the bill of sale was the true consideration, was wrong, and correctly refused. It was competent to show a different consideration, and that it had been paid before the making of the bill of sale.

SAME.—*Agreement of Mortgagor to Permit Foreclosure.*—An agreement by the plaintiff, who was a mortgagor of land, to permit a foreclosure of the mortgage, and the accomplishment of such foreclosure, constitute a sufficient consideration to support the bill of sale in suit made by the defendant, who was the mortgagee, to the plaintiff.

SAME.—In such case, the mortgagor had the right, by payment, to prevent a foreclosure; and, having yielded that right and the right of redemption, the plaintiff, in effect, agreed that the title should pass to the mortgagee as if a deed had been bargained for and made.

SAME.—*Valid Sale while Under Levy.*—The owner of property under the levy of executions may sell it, and, when they are satisfied, the sale, if otherwise valid, is good against the world.

PRACTICE.—Instruction.—Right of Possession and of Property.—A party, desiring a more accurate statement of the issue than that made in an instruction must move for it at the time, and, failing to do so, can not be heard to complain of it on appeal; and where the right of possession is practically the right of property, an instruction that the ownership is the question in issue, is not erroneous.

SAME.—Evidence of Ownership.—Tax Schedules.—Where the schedule of each claimant, returned for taxation after a sale bill was made, had been admitted in evidence without objection, one including and the other not showing the property claimed, it was not error for the court to exclude a return by the latter the next year, to prove that he then included it with his property.

SAME.—Declarations of a party are provable against, but not for, him. He can not manufacture evidence for himself in that way.

From the Vanderburgh Superior Court.

S. R. Hornbrook, A. Gilchrist and C. H. Butterfield, for appellant.

C. Denby and D. B. Kumler, for appellee.

WOODS, J.—The argument of the appellant's counsel is confined to the error assigned upon the overruling of the

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motion for a new trial. The first point made in the brief is, that there is not sufficient evidence of a demand for the property, sought to be recovered by the plaintiff, before the commencement of the action. The plaintiff testified that she left the house of the appellant, her father, where she had been living, in March, 1878, and at that time left the property with him. A demand was therefore necessary before his possession could be made wrongful. The appellant testified that the plaintiff never said the property was hers before she left, and that the first he knew she claimed it was when Brown came and demanded it. Albert G. Brown testified that he made a demand for the property mentioned in the complaint for the plaintiff. Taken together, this testimony affords clear proof that a demand was made upon the defendant in the plaintiff's behalf, before he was served with summons in the case, if a summons was issued, because Brown's demand, according to his own statement, was the first he knew of the claim; and, in the absence of any contrary proof, or even suggestion in the evidence, we would not be warranted in disturbing the verdict for the lack of more definite evidence on the subject. It is evident from the whole record, and especially from the instructions given and asked, that there was no contest or question on the trial in reference to a demand.

The appellant complains next because the court refused to give the following instructions:

"2d. If the jury shall find that the bill of sale was made without any actual consideration as between them, the plaintiff is not entitled to recover the possession of the property described in the bill of sale.

"3d. If the jury shall find that the price of the property mentioned in the bill of sale between the parties has never been paid or tendered by the plaintiff to the defendant, and that the defendant has always retained the possession of such property since the making of said bill of sale, then the

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plaintiff will not be entitled to recover the possession of said property in this action."

In so far as they are correct, the substance of these instructions is contained in other charges which were given, but they are not fully correct. Notwithstanding the bill of sale was without consideration, there was evidence tending to show a delivery of possession under it, which, if made, constituted, or at least tended to show, a perfect gift, and if, after making a gift of the property to the appellee, the appellant obtained possession without right, and refused to surrender it on proper demand made, the appellee was entitled to bring the action. The other instruction is wrong, for assuming that the price mentioned in the bill of sale was the true consideration. It was competent to show, and the evidence adduced by the appellee did tend to show, quite a different consideration, and that it was paid before the making of the bill of sale.

There was evidence that the appellant held a mortgage on some land owned by the appellee and her child, and that the parties made an agreement, that, in consideration of the appellee permitting the appellant to foreclose his mortgage, he would pay her the sum of \$4,000; that the foreclosure was accomplished accordingly, and that the bill of sale, brought into question in this action, was made in part payment of the said sum of \$4,000. The appellant requested an instruction to the effect that such an agreement to pay for the right to foreclose, which right he had independent of the agreement, was a nullity, and could afford no consideration for the bill of sale. It is not to be questioned that the appellant had a right to foreclose, if his demand were not paid, but the appellee, at the same time, had the right, by paying the debt, to prevent the foreclosure, and, beyond that, had the statutory right of redemption, and, if the appellant agreed to pay her for foregoing or surrendering these rights, and she made the surrender, his obligation to pay therefor

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became perfect, and was a sufficient consideration for the bill of sale. It was, in effect, an agreement for the purchase, by the appellant, of the appellee's interest in the mortgaged land, and that the title should be passed by means of a foreclosure of the mortgage instead of by deed, and, when he obtained the title in that way, he was as much bound to pay the price as if a deed had been bargained for and made.

The further objection is made that the court instructed that the question to be determined by the jury was, whether the plaintiff was the owner of the property ; while, as is insisted, the true question was, whether the plaintiff was entitled to the possession. This objection is answered in what we have said upon the subject of demand. Technically, the right of possession was the issue, but practically, it was the right of property ; and, therefore, there is no available error in the instruction. If the appellant had deemed it material to have a more accurate statement of the issue, he should have moved for it at the time, but, not having done so, he has no substantial ground for complaint now.

The court gave the following as a part of one of its instructions :

"If the defendant was indebted to her, he had the right to pay her in property. If he chose so to pay her, and she chose to accept the property in payment, it does not matter that executions may have been outstanding which were liens on the property."

Counsel say that the property had been levied on, and was under the levy when the bill of sale was made, and that the bill of sale was, therefore, void when executed, and could not become valid by a subsequent ratification. But the sale was not void between the parties. The owner of property under the levy of an execution may sell it, and on payment of the execution, the sale, if otherwise valid, is good against the world. The evidence in this case shows, and there is no dispute on the point, that the executions levied on the prop-

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erty were paid and satisfied within a short time after the date of the sale bill.

The remaining question arises upon the exclusion of an item of evidence offered by the appellant. The appellee had proved, without objection, that in 1877, after the making of the sale bill, she listed the disputed property for taxation in her own name, and that the appellant made no return thereof, and, for the purpose of showing this, their respective schedules were put in evidence. The appellant then proved by the assessor, that the appellee made no return of the property in 1878, and offered to put in evidence his own return, and thereby, and by the aid of witnesses, to show that the property in suit was listed for taxation against him in 1878. The ruling of the court was right. The appellant may have made the last schedule in anticipation of the proposed use of it in evidence. He could not manufacture evidence for himself in that way. It was, in principle, the same as offering to prove his own declarations, which, though provable against, were not admissible for, him.

The judgment is affirmed, with costs.

75	490
124	288
75	490
128	100
75	490
130	246
75	490
136	266
75	490
141	543
75	490
147	416
75	490
167	526

No. 7782.

**THE TOLEDO, WABASH AND WESTERN RAILWAY CO. v.
BRANNAGAN, ADMINISTRATRIX.**

CONTRIBUTORY NEGLIGENCE. — *Pleading.* — *Complaint.* — *Railroad.* — In an action against a railroad company for injuries to plaintiff's intestate, caused by his falling into a culvert constructed by the defendant under its track in a public street of a city, and by defendant negligently permitted to remain open and uncovered, a complaint which avers that the intestate, "while exercising due and reasonable care and without his fault or negligence on his part," fell into and through the opening in the culvert, sufficiently alleges that he was not guilty of contributory negligence.

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SAME.—*Highway.*—*Knowledge of Defect.*—*Reasonable Care.*—Knowledge of the existence of a dangerous defect in a highway makes it incumbent on the traveller to use care and caution proportionate to the danger which he knows lies in his way; but knowledge will not overcome an explicit averment of reasonable care and prudence.

SAME.—*Evidence.*—Where, on the trial of such action, the evidence showed that the intestate lived near the culvert and was familiar with its character and location, and no evidence was given to show that he was free from contributory negligence, there is an utter failure of proof.

SAME.—*Presumption.*—There is no presumption that one who claims damages for injuries caused by the negligence of another was himself free from fault.

From the Carroll Circuit Court.

C. B. Stuart, for appellant.

ELLIOTT, J.—The complaint of the appellee alleges that the appellant is a corporation owning and operating a line of railway extending through the city of Delphi; that the corporation constructed a track across Washington street, a public street of said city; that, in constructing said track the appellant constructed a drain and culvert under its track in said street, at a point where the street was crossed by said track; that the drain was of the depth of six feet, and of the width of five feet; that appellant negligently permitted a portion of the culvert across said drain to remain open and uncovered, leaving an uncovered space of such a character as to be dangerous to those who travelled upon said street; that the appellee's intestate, Thomas Brannagan, while walking along said street at a point where appellant's track crosses, and "while exercising due and reasonable care and without his fault or negligence on his part," fell into, and through, the opening in the said culvert and received injuries from which he died. It is fairly inferable from the allegations of the complaint that the deceased knew of the dangerous place in the highway, and that he had many times passed and repassed the spot near the opening in the culvert which made the street unsafe.

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It is contended that the complaint is bad, because it shows the deceased went upon the highway with full knowledge of the existence of the dangerous culvert, and that he was therefore guilty of contributory negligence. It is undoubtedly true as counsel assert, in language borrowed from a very old case, that "a man must not cast himself upon an obstruction, which has been made by the fault of another, and to avail himself of it, if he do not himself use common and ordinary caution to be in the right." But the rule expressed in the quotation we have made, does not go to the extent of holding that knowledge of the existence of a dangerous defect in a highway requires a traveller to keep off the highway altogether. If the danger of passing is so great that a man of ordinary prudence, possessing knowledge of its existence, would not attempt to pass it, then it might perhaps be contributory negligence for one acquainted with the location and character of the dangerous spot to attempt to pass in close proximity. Knowledge that there is a defect in a highway, making it dangerous to attempt to travel upon it, does not of itself, make it negligence to use the highway carefully and cautiously. Knowledge of the existence of a dangerous place does, however, make it incumbent upon the traveller to use care and caution proportionate to the danger which he knows lies in his way. The fact that the injured person had knowledge of the dangerous condition of the highway is always an important matter for consideration, but it is not always sufficient to establish contributory negligence. *Clayards v. Dethick*, 12 Q. B. 439; *Reed v. Northfield*, 13 Pick. 94; *Humphreys v. Armstrong County*, 56 Pa. St. 204; *Hutton v. Corporation of Windsor*, 34 U. C. Q. B. 487; *Whittaker v. Inhabitants of West Boylston*, 97 Mass. 273. The fact that the complaint shows that the appellee's intestate knew of the dangerous place in the street is not sufficient to overcome, or make nugatory, the explicit averment that the said intestate did exer-

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cise reasonable care and prudence, for it may well be true that he did exercise such prudence and care, although he had full knowledge of the dangerous defect in the street. There was no error in overruling the demurrer to the complaint.

The evidence showed that appellee's intestate lived about two hundred yards distant from the culvert where appellee alleges he received the injuries which caused his death; that he left his home some time between six and seven o'clock on the evening of the accident; that he returned between seven and eight; that immediately upon his return he complained of his left side; that physicians were sent for; that the pain was so great that the physicians were unable to make an examination, and that the deceased died about nine o'clock the same night. The only evidence showing, or tending to show, how the deceased received the injury from which he died, is that of Mary Brannagan, Jerry Dillon, Mary Dailey and the physicians. Mary Brannagan says she gave Jerry Dillon the shoes of the deceased, and Jerry testified: "I work at the boot and shoe trade; I went to the culvert in question about an hour after Brannagan's death; I found tracks in the culvert and measured them, and compared the measure with a pair of shoes I got at the house: they seemed to agree; the bottom of the culvert was sand and clay mixed; I saw other marks that looked like hand marks, but I can not say." Mary Dailey testified that she was on the street on the night of Brannagan's death; that, when not far from the railroad track on her way home, she heard some one cry out in pain, and thought it sounded like a call for help; and, also, that the cry sounded as if it came from the culvert. The physicians testified as to the death of Brannagan, that they made a *post mortem* examination, and that his death resulted from rupture of the spleen. Dr. Richardson said that there was a small mark on the heart of Brannagan; that he could not

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say that the infliction of the injury which made the mark caused the rupture, but that it might possibly have done so. In answer to a question of appellee's counsel, as to whether a person falling into a culvert would likely receive such an injury as that which caused Brannagan's death, the witness said: "It might, though not necessarily; my judgment is, he fell against something." The testimony of Dr. Smith, who assisted at the autopsy, is substantially the same as that of Dr. Richardson.

It is earnestly argued that the evidence does not show that appellee's intestate fell through the culvert, but we do not find it necessary to decide this question, for we think the evidence is plainly insufficient upon another material point. The deceased knew of the location and character of the culvert. The dangerous place was so situated, with reference to the adjacent parts of the highway, that one acquainted with the culvert and its surroundings might, by exercising ordinary prudence and care, readily have passed the place in entire safety. There is not a syllable of testimony showing what Brannagan was doing, or how he was conducting himself, at the time he received the injury which caused his death. If it be granted that there were circumstances from which it could be inferred that Brannagan did receive his injuries from a fall into appellant's culvert, there are certainly none from which it can be inferred that he was exercising reasonable care. Whatever might be the fair inference, if Brannagan had been unacquainted with the culvert and its surroundings, it can not be inferred, as against the facts that he did have knowledge, and that a man using due care might easily have travelled the highway in safety, that he was free from fault. The mere fact that he actually fell into the culvert, would not, itself, supply evidence that he was at the time he fell exercising reasonable care. There is no presumption that one who claims damages for

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injuries caused by the negligence of another was himself free from fault. In *Cordell v. The New York, etc., R. R. Co.*, 75 N. Y. 330, it is held, that where one has been killed by the negligence of another, the circumstances must show due care on his part. Where the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited. Wharton Negligence, sec. 421. In *Warner v. The New York, etc., R. R. Co.*, 44 N. Y. 465, the court used this language: "It is the duty of the plaintiff to prove, and the right of the defendant, who is charged with negligence causing an injury, that he should prove, by satisfactory evidence, that he did not contribute to the injury by any negligence on his part. This proof, in some form, constitutes a part of the plaintiff's case." It can not be presumed that the plaintiff is free from fault.

It is unnecessary, however, to multiply citations, for the rule has been long and firmly settled, in this State, that the evidence must show that the plaintiff, in actions to recover for an injury resulting from the negligence of another, was himself free from contributory negligence. The evidence in this case fails entirely upon this point. There is not simply a conflict of evidence; there is an utter failure of proof. There is neither direct testimony nor circumstantial evidence, tending to prove that the appellee's intestate was without fault.

The court erred in overruling appellant's motion for a new trial.

Judgment reversed, at costs of appellee.

Mench *v.* Carter.

No. 7508.

MENCH *v.* CARTER.

REAL ESTATE.—Purchase-Money.—Payment with Money to be Borrowed.—

Pleading.—Complaint.—Demurrer.—Where C. agreed with M., December 26th, 1877, to pay him or his creditors the purchase-money of land "as soon as the money can be procured by making a loan on said C.'s land," the complaint of M., alleging his tender of a deed April 19th, 1878, the failure of C. to pay, and that it was possible for him to have obtained a loan, through loan agents named, by mortgaging his real estate, and agreeing to pay ten per cent. interest, is sufficient on demur-rer to put C. on his defence.

SAME.—Reasonable Time.—In such case, the plaintiff gave the defendant a reasonable time before tendering his deed.

SAME.—Query.—Did not the defendant unconditionally bind himself to procure a loan within a reasonable time?

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge, M. Bell and M. McDowell, for appellant.

J. F. Elliott, — Kirkpatrick, N. R. Lindsay and T. A. DeLand, for appellee.

NIBLACK, J.—Action by Samuel W. Mench against Nathan W. Carter upon the following written agreement:

"KOKOMO, INDIANA, Dec. 26th, 1877.

"Article of agreement entered into this day by and between Samuel W. Mench, party of the first part, and Nathan W. Carter, party of the second part:

"Whereas the said Samuel W. Mench has this day sold to the said Nathan W. Carter the following described real estate, in Howard county, Indiana, to wit: Being a part of the north half of the northeast quarter of section 8, in town-ship 24 north, and range No. 4 east, more particularly de-scribed as follows: Commencing at the northwest corner of the northeast quarter of section 8, thence east $148\frac{1}{2}$ rods, thence north 80 rods, thence west $148\frac{1}{2}$ rods, thence north 80 rods, to place of beginning, containing $74\frac{1}{2}$ acres, more or less.

"Now, the said Nathan W. Carter agrees to pay the said Samuel W. Mench, or his creditors, the sum of twenty-seven

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hundred and sixty dollars as soon as the money can be procured by making a loan on said Carter's lands. It is further agreed by the parties hereto, that in case the liens or incumbrances against said land shall exceed twenty-seven hundred and sixty dollars, and the said Samuel W. Mench fails to reduce by payment or otherwise the liens down to that amount, then, and in that event, this agreement shall be null and void.

"The said Mench further agrees to give possession of the above described land to the said Nathan W. Carter, on the 25th day of December, 1878, the said land having been rented to William A. Wise for the coming year; and said Carter is to have the privilege of sowing wheat on said land in the fall of 1878.

SAMUEL W. MENCH.

"NATHAN W. CARTER."

The complaint averred that on the 19th day of April, 1878, the liens and incumbrances of every kind against said tract of land were, and ever since have been, less than the sum of \$2,760; that on that day the plaintiff caused a warranty deed, properly executed and acknowledged by him, to be tendered to the defendant, conveying to him, the defendant, a full, true and complete title to said land, but that the defendant refused, and had ever since continued to refuse, to accept said deed; that the defendant had not paid either to the plaintiff, or his creditors, said sum of \$2,760, or any part thereof; that the defendant was, at the time of the execution of the agreement sued on, and had since continued to be, the owner of several tracts of land, describing them, amounting in the aggregate to 171½ acres, and of the value of \$45 per acre; that at the time of the execution of said agreement, as above stated, it was, and had since continued to be, possible for the defendant to obtain a loan from various sources by means of, and through the agency of, persons acting in the city of Kokomo on behalf of various companies, and especially through the agency of a firm known by the name and

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style of Moreland & Johnson, by mortgaging his real estate, and by agreeing to pay interest at the rate of ten per cent. per annum ; that, although it was thus possible for the defendant to obtain money and to comply with his agreement, he had refused, and still continued to refuse, to do so. The plaintiff brought the deed, tendered to the defendant, into court, with a demand for judgment and for general relief.

The defendant demurred to the complaint, for want of sufficient facts, and his demurrer was sustained. The plaintiff failing to plead further, final judgment was rendered upon demurrer. The plaintiff appeals, and, arguing in support of the sufficiency of his complaint, contends that the decision of the court, upon the demurrer, was erroneous.

The objection urged to the complaint is, that the averment that it was possible for the defendant to have obtained a loan, with interest, at the rate of ten per cent. per annum, by mortgaging his lands, was not sufficient to put him in default for not procuring a loan on his lands ; that, to thus place him in default, it was necessary to aver, in effect, that the defendant might have procured a loan by a reasonable effort, and upon fair terms. In our opinion, this objection can not be sustained. The averment to which the objection is urged, as we construe it, amounts to an allegation that the defendant might have procured a loan on his lands, at ten per cent. interest, which was, at the time, a lawful rate of interest. This was, we think, sufficient to put the defendant upon his defence. The complaint shows that the plaintiff gave the defendant a reasonable time in which to procure a loan before tendering him a deed.

Quære, whether the defendant did not unconditionally bind himself to procure a loan within a reasonable time?

The complaint appears to us to have been sufficient upon demurrer.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Haggerty v. Byrne et al.

No. 8217.

HAGGERTY v. BYRNE ET AL.

REAL ESTATE.—*Mortgage.—Bankruptcy of Mortgagor,—Assignee's Conveyance to Mortgagee.—Inchoate Interest of Mortgagor's Wife Vested.—Descent at Her Death.*—In an action to foreclose a mortgage, a cross complaint of the husband, his wife being dead, alleging that the mortgagee procured and accepted a conveyance from his assignee in bankruptcy for his two-thirds of the land, and claiming to hold the one-third vested in his wife and inherited by him at her death free of the mortgage, is insufficient on demurrer.

SAME.—*Descent to Husband.—Interest of Wife Subject to Mortgages.*—Where the husband inherits the wife's one-third interest acquired by her under the act of March 11th, 1875, 1 R. S. 1876, p. 554, he inherits it, as she took and held it, subject to mortgages that were liens.

SAME.—*Assignee's Deed not Satisfaction.*—An assignee's deed to the mortgagee does not in equity operate to satisfy the mortgage, but implies that the land would not more than satisfy it, and the mortgagee's acceptance does not imply an intention that the mortgage shall be merged in the fee.

SAME.—*Case Distinguished.*—In such case, an acceptance of a deed for two-thirds will not release the remaining one-third of the mortgaged land, unless such be the plain intention at the time, and upon foreclosure the holder of the one-third may not claim to have the two-thirds first sold. *Medsker v. Parker*, 70 Ind. 509, distinguished.

BANKRUPTCY.—*Liens Preserved.*—A discharge in bankruptcy releases the bankrupt from his covenants, but all liens valid at the inception of the proceedings are preserved, and may be enforced.

PRACTICE.—*Foreclosure.—Directions for Sale.—Motion in Supreme Court.*—Where, upon judgment of foreclosure, a motion was made for directions as to the sale of property, and such directions were given as the equities of the parties demanded, there was no error; but a motion for such directions can not be first made in the Supreme Court.

From the Vigo Circuit Court.

S. C. Davis, S. B. Davis and C. F. McNutt, for appellant.

W. Mack and J. G. Williams, for appellees.

BICKNELL, C. C.—This was a suit by the appellee John Byrne against the appellant and his wife and Thomas Parsons, upon two promissory notes, made by the appellant and

75	499
126	421
75	499
129	462
75	499
140	333
141	327
75	499
148	290

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secured by mortgages executed by the appellant and his wife. Thomas Parsons was made a defendant as a junior judgment creditor of the appellant. The complaint demanded judgment upon the notes and foreclosure of the mortgages. By the death of the appellant's wife, the suit as to her was abated. The appellant filed a cross complaint, in two paragraphs, to each of which the appellee demurred, "for the reason that the same did not contain facts sufficient to constitute a cross complaint." Said demurrers were sustained by the court, and the appellant excepted. He refused to answer further. The appellee Thomas Parsons filed an answer, and the cause was submitted to the court for trial. The court found for the appellee, and rendered judgment in his favor for the amount of the notes and interest, and for the foreclosure of the mortgages.

The errors assigned by the appellant are, that the court erred in sustaining said demurrers. The first paragraph of the cross complaint admits the execution and the maturity of the mortgages, and alleges that, after their execution, the appellant was duly declared a bankrupt, and that all of his estate became vested in his assignee in bankruptcy; that his wife was then living, and that she thereby became the owner of one undivided third of the mortgaged land; that, while she was such owner, said assignee in bankruptcy, by the order of the court which declared the bankruptcy, conveyed to the appellee all the right, title and interest in said mortgaged lands, vested in him as such assignee; that such order was procured by the appellee; that afterward the appellant's wife died seized of said undivided one-third of said lands, which, by her death, became vested in the appellant; that the value of the said two-thirds so conveyed to said appellee by said assignee was greater than the debt secured by said mortgages, and that said conveyance was made for the nominal consideration of one dollar, and was really made to appellee as such mortgagee; that appellant is still seized of

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the estate thus vested in him upon his wife's death, and that one of the objects of appellee's suit is to foreclose as to such estate. Wherefore appellant prays that said mortgages, as to said undivided one-third, be declared satisfied, and that his title thereto be quieted, and that his said interest be set off and assigned to him, and for all other proper relief.

The second paragraph of the cross complaint differs from the first, in alleging that the order to convey the mortgaged land to the appellee was procured by the appellee "and by said assignee," and in averring the execution of another mortgage, by the appellant to the appellee, upon a part of the same land embraced in one of the mortgages sued on, and that said third mortgage is not due, and that said conveyance, by the assignee in bankruptcy to the appellee, was made in payment of all of said mortgages, severally, and upon no other consideration, and that the value of said two-thirds, so conveyed to the appellee, exceeds the amount of the incumbrances thereon respectively, and that, by said conveyance, said mortgages have all been paid to the extent of the value of two-thirds of said lots respectively, and that they ought to be declared satisfied, or, if not fully paid, they ought to be declared satisfied to the extent of the value of the two-thirds so conveyed. In this paragraph appellant makes the mortgages sued on a part of his cross complaint, referring to them as they appear on certain lines and pages of the complaint, and he annexes a copy of said mortgage not yet due, and prays that an account be taken, and that, if the value of the interest so conveyed to the appellee by the assignee in bankruptcy be equal to or greater than the mortgage debts, then said mortgages, as to him and said undivided one-third, be declared satisfied, and that, if the value of said interest be not sufficient to pay said mortgages, then said mortgages, as to appellant's said undivided one-third of the lands, be foreclosed as to such deficiency only. This paragraph concludes with a prayer that said un-

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divided one-third "be partitioned" and set off to the appellant, and for all other proper relief.

The act of March 11th, 1875, 1 R. S. 1876, p. 554, provides that, in all cases of judicial sales of real property, in which a married woman has an inchoate interest by virtue of her marriage, and such inchoate interest is not directed by the judgment to be sold, or barred by such sale, such interest shall become absolute and vest in the wife, in the same manner and to the same extent as such inchoate interest now becomes absolute upon the death of the husband, whenever, by virtue of such sale, the legal title of the husband shall become vested in the purchaser thereof. Sec. 1. The same act, in section 3, provides that, upon the death, during the marriage, of a wife holding such real estate, it shall descend to her surviving husband.

In *Roberts v. Shroyer*, 68 Ind. 64, it was held that the conveyance of the bankrupt's property to the assignee by the register is a judicial sale within the meaning of said act of March 11th, 1875, and that the inchoate interest of the wife, in the lands of her bankrupt husband, becomes absolute, and is vested in the wife immediately upon the conveyance to the assignee; but it is also held that, where a wife joins in a mortgage, she has no inchoate interest in the land that can be asserted against the mortgage. *Kissel v. Eaton*, 64 Ind. 248; *Jackman v. Nowling*, 69 Ind. 188. Under the act of March 11th, 1875, the wife undoubtedly takes as a purchaser, and if she dies seized, during the marriage, the land descends to her husband as her heir. *May v. Fletcher*, 40 Ind. 575. He inherits it, to hold just as she held it, subject to the mortgage. The wife of the appellant, having joined in the mortgages, afterward, by operation of law became the owner in fee, in her own right, of an undivided one-third of the mortgaged land; but the conveyance of the land by the assignee in bankruptcy to the mortgagee did not, in equity, operate as a satisfaction of the mortgage. Although,

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as a general rule, when the mortgagee acquires the fee simple of the mortgaged land the mortgage is thereby merged in the fee, yet, in equity, the mortgage will always be kept alive, if the mortgagee desires it and if it be necessary to protect any of his interests, unless he agreed or intended to abandon it. In this case, if the mortgaged lands had been deemed to be of more value than the mortgaged debts, they could not have been conveyed by the assignee in bankruptcy to the appellee. The theory of that conveyance was that the lands would not more than satisfy the mortgages. In such a case, the acceptance of the conveyance by the mortgagee does not show an intention in him that the mortgage shall be merged in the fee.

When the wife, by virtue of her statutory connubial rights, acquired one-third of the land in fee, she took it subject to the mortgage, in which she had joined. The fact that, by operation of law, her inchoate interest was changed into a consummate interest, did not satisfy the mortgage as to her one-third of the land. Under the act of March 11th, 1875, *supra*, she took one-third absolutely as if her husband were dead, but it was not discharged from the mortgage. In *Graves v. Braden*, 62 Ind. 93, the following is the language of the court: "She had joined with him in a valid mortgage of that third of said real estate to Graves, the appellant. That mortgage had not been paid, or in any way satisfied, but remained in full force against the mortgagors; and, on the death of her husband, it became a lien on the one-third interest in said lands, which, on her husband's death, vested in her. The lien became, by that event, enlarged from one on the inchoate interest of the wife to one on the consummate interest of the widow in one-third of said real estate. *Hoadley v. Hadley*, 48 Ind. 452."

In the case at bar, the husband, who took, by descent, the same estate held by his wife, has no greater right than she had. It is claimed, however, that, although the wife,

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in such a case, can not have satisfaction of the mortgage as to her one-third, yet she may be entitled, in equity, to an order that the mortgagee shall first sell the other two-thirds of the land, and it is said that her case resembles that of a purchaser of one-third of mortgaged premises, who could always compel the mortgagee to sell first the other two-thirds, of which the title remained in the mortgagor; but the difference is, that such purchaser is not bound by any lien created by himself, while the wife is so bound, and a discharge in bankruptcy does not impair liens which were valid at the inception of the proceedings.

In the case of *Jackman v. Nowling*, *supra*, this court held that a wife takes her interest under section 1 of the act of March 11th, 1875, free from all demands of the general creditors of her husband, but not free from prior conveyances thereof by way of mortgage, executed by her and her husband in due form of law; as to such mortgage debts, the wife's one-third interest is bound for its proportionate part thereof, as much so after the title has vested in her, as it was while such title remained in her husband, and, in making partition, such mortgages must be taken into account and considered in the division to be made. This case is exactly in accordance with the case of *Graves v. Braden*, *supra*.

In the subsequent case of *Medsker v. Parker*, 70 Ind. 509, Parker and wife made a mortgage to secure Parker's debt. The note and mortgage came, by assignment, to the plaintiff, who had also become the owner of the mortgaged lands, by conveyance from a person who had bought them at a sale under an execution issued on a judgment against Parker. By virtue of that sale, one-third of the land had become vested in Parker's wife, under the act of March 11th, 1875, and it had been set off to her in a partition suit. The plaintiff, holding the note and mortgage, and owning two-thirds of the mortgaged land in fee, brought suit against Parker and wife for foreclosure, and prayed that the interest

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of Parker's wife might be first sold to satisfy the debt. It appeared that the two-thirds of the land held by the plaintiff were more than sufficient in value to pay the entire mortgage debt, and, also, the entire judgment on which the land had been sold.

Upon the facts above stated, the plaintiff clearly had no right to claim that any part of the mortgaged land should be sold separately ; his right was that the whole land should be sold to satisfy the mortgage. The court therefore rendered a decree for the foreclosure of the mortgage. The plaintiff then moved for an order that the interest of Parker's wife be first sold ; this motion was overruled, and the court ordered that the estate of the plaintiff be sold first, and that the interest of Parker's wife should not be sold unless the estate of the plaintiff should prove insufficient to pay the mortgage debt. This court, on appeal, held that the foregoing order of the court below was right, referring to *Newcomer v. Wallace*, 30 Ind. 216 ; *Hunsucker v. Smith*, 49 Ind. 114, and *Perry v. Borton*, 25 Ind. 274. In this last case, it was held that the right of the widow is absolute against creditors, unless, by joining with her husband in a mortgage, she has waived it, and that even then the waiver can operate only in favor of the mortgagee. The other two cases referred to merely affirm the general doctrine, that, where a decedent's estate is incumbered by a mortgage, the heirs and the widow can compel payment of the mortgage out of the personal estate, if there be any.

It is evident that the case of *Medsker v. Parker, supra*, was decided upon the manifest equity of its peculiar circumstances, and that it ought not to be extended beyond the circumstances to which it was applied, and that it does not in any degree impair or change the general doctrine established in *Graves v. Braden, supra*, and *Jackman v. Nowling, supra*. It decides only that where, upon a judgment of foreclosure, a motion is made for directions as to the

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sale of the property, and such directions are given as the equities of the parties demand, there will be no error in such directions.

It will be observed that no such motion was made in the court below in the present case, and it can not be made for the first time here. Even if the wife of Haggerty, while living, had such an equity as is claimed by her husband in the case at the bar, it by no means follows that when, by act of law, her one-third of the land is cast upon him, he can claim the same equity. When a man without title, or with an incomplete title, mortgages land, his subsequent acquisition of a better title inures to the benefit of the mortgagee, who may still foreclose his mortgage as to all the land, notwithstanding that the mortgagor has acquired a new and more perfect title to part of it. In such a case, the mortgagor has no right to claim that the mortgagee shall first sell on foreclosure, the remainder of the land before resorting to the part covered by the new title. The new title is considered as vested in the mortgagor in the same manner as if he held it when the mortgage was executed, *Jones Mortgages*, secs. 561, 679, 825, 1483, 1656, and cases there cited. Where, as in Indiana, the mortgage is regarded as a mere lien, the rule just stated rests upon the principle that the mortgagor is estopped by his covenants. The mortgage in the present case contained full covenants of warranty. It has been suggested that as the discharge in bankruptcy releases the bankrupt from his covenants, therefore he is not bound by the estoppel; but the rule is, that all liens are preserved in bankruptcy, except such as violate some provision of the bankrupt act, and a mortgage lien is not preserved, where the rights of the mortgagee in enforcing it are in any way diminished or impaired. *Truitt v. Truitt*, 38 Ind. 16; *Pierce v. Wilcox*, 40 Ind. 70.

In *Bush v. Person*, 18 How. 82, it was held that the

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bankrupt law of 1841, which, as to liens, contained substantially the same provisions as the bankrupt law last in force, does not annul the bankrupt's personal covenant of warranty so as to relieve him from the estoppel. The court said: "The purpose of the legislature to afford complete and effectual protection to mortgage titles, against anything which was to be done under the act, and the broad and strong terms in which this purpose is expressed, require us to say, that the debtor can not derive from the act an enabling power to do or assert anything which will impair a mortgage otherwise valid. Nor is there any incongruity with established principles, in holding that the personal discharge of the debtor does not free him from the estoppel." An estoppel may exist without any personal liability. *Van Rensselaer v. Kearney*, 11 How. 297. So, in the case of *Stewart v. Anderson*, 10 Ala. 504, the court said in reference to the bankrupt act: "The rights and remedies of the mortgagee * were wholly unaffected by it, and that the relation of the parties remains undisturbed."

It follows that the court below committed no error in sustaining the demurrer to the first paragraph of the cross complaint.

Nor was there any error in sustaining the demurrer to the second paragraph of the cross complaint.

In this paragraph the appellant, alleging that some of the land is covered by a third mortgage, executed by him to the appellant, and not yet due, avers that the two-thirds, conveyed by the assignee in bankruptcy to the appellant, are of equal or greater value than all the mortgage debts; therefore he asks that an account be taken, and that, if his allegations be true, then the mortgage be declared satisfied as to his one-third, or that, if the value of the two-thirds be found less than the amount of all the mortgage debts, then the mortgage be foreclosed, as to his one-third, to the extent of such deficiency only.

Lowry *et al.* v. McGee.

Both of these paragraphs rest upon the proposition, that when a mortgagee becomes the owner in fee of two-thirds of the mortgaged land, then his remedy upon the mortgages as against the mortgagor shall be confined to said two-thirds, either absolutely, as the first paragraph of the cross complaint demands, or subject to an accounting, as the second paragraph demands. In such a proposition, there is neither law nor equity. The mortgagee, in return for his money, received mortgages on the entire property, the mortgages being due and unpaid; the mortgagee has legally and equitably, as against the mortgagors, a right to foreclose as to all the property. No authority need be cited to show that the mortgagee, by taking the fee of part of the mortgaged property, will not cause a merger of the entire mortgage, and will not cause the remedy of the mortgagee to be confined to the part so taken in fee, unless such be the plain intention at the time. If no intention appear, equity considers the mortgage as outstanding or extinguished, as the interest of the mortgagee may require. *Howe v. Woodruff*, 12 Ind. 214, and cases there cited. The opinion of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, at the costs of the appellants.

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No. 8137.

LOWRY ET AL. v. McGEE.

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ATTACHMENT.—Lien.—Judgment.—The lien created by the issuing and levy of an attachment can not exist or have any force or effect after judgment has been rendered in the cause, in aid of which it issued, unless there is a special judgment or order of sale of the property attached, and a special execution.

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SAME.—Personal Judgment.—Abandonment of Lien.—Real Estate.—The taking of a personal judgment only, in an action in which real estate had been attached, is an abandonment of the attachment lien, and the judgment stands as though no attachment proceedings had been commenced.

From the Delaware Circuit Court.

J. L. Furgason, J. H. Mellett and W. March, for appellants.

M. E. Forkner, C. Cambern, J. N. Templer and R. S. Gregory, for appellee.

FRANKLIN, C.—This is a suit for the possession of real estate. Appellee claims under a sheriff's deed, executed upon a sale under an execution upon a judgment rendered February 25th, 1873. Appellants also claim under a similar chain of title, derived under another judgment, rendered April 16th, 1872. Appellee claims priority of title, for the reason that the suit upon which his judgment was rendered was commenced with an attachment proceeding, and the property in controversy attached, September 4th, 1871. Appellants claim priority for the reason that there was no trial, no finding of the court, no judgment, no order for the sale of the attached property, and no adjudication whatever in the attachment proceedings. There was a trial, finding and judgment by the court for appellee.

The question is presented in this court by an assignment of error on the overruling of appellants' motion for a new trial, for the reason that the finding was contrary to law. As to this question there is no controversy about the facts. Appellee took his judgment *in personam* for the amount of his claim, without any judgment *in rem* against the property, or any order whatever in relation to the property or the attachment proceeding. He insists that the attachment lien merged into this ordinary personal judgment, and was carried along with it without any further order in relation to it.

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While attachment proceedings are not independent, from which alone an appeal would lie, but are collateral and in aid of the main action, yet it is as necessary that the provisions of the statute in relation to perpetuating and making good the lien should be as strictly complied with, as the ones creating the lien. *The State, ex rel., v. Miller*, 63 Ind. 475; *The Excelsior, etc., Co. v. Lukens*, 38 Ind. 438; *Gass v. Williams*, 46 Ind. 253.

No lien created by the issuing and levy of an attachment under our statute can exist or have any force or effect after judgment has been rendered in the cause, in aid of which it has been issued, unless there is a special judgment or order of sale of the property attached, and a special execution. 2 R. S. 1876, p. 111, sec. 188; *The State, ex rel., v. Manly*, 15 Ind. 8; *Foster v. Dryfus*, 16 Ind. 158; *McCollem v. White*, 23 Ind. 43; *Perkins v. Bragg*, 29 Ind. 507; *Moore v. Jackson*, 35 Ind. 360; *Gass v. Williams*, 46 Ind. 253; *Lowry v. Howard*, 35 Ind. 170; *Willets v. Ridgway*, 9 Ind. 367.

The attachment proceedings presented an issue, and if there was no adjudication whatever of that issue, the taking of the personal judgment alone was an abandonment of the attachment lien, and the judgment stood as though no attachment proceedings had been commenced in the cause.

We think the finding and judgment of the court below was contrary to law, and that a new trial ought to have been granted.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, at the costs of appellee.

Colee *v.* The State.

No. 9526.

COLEE *v.* THE STATE.

PRACTICE.—*Bill of Exceptions.*—*Affidavit.*—*Record.*—An affidavit for a continuance can only be made a part of the record by a bill of exceptions, and a bill of exceptions can only incorporate an instrument by reference when the instrument referred to is already properly in the record. It is not necessary to copy an instrument in the bill of exceptions, when it is already properly in the record; but when it is not properly a part of the record, although copied therein by the clerk, it must be set forth in the bill of exceptions as the statute requires.

CRIMINAL LAW.—*Practice.*—*Exceptions.*—*Bill of Exceptions.*—*Statute Construed.*—A bill of exceptions, by section 120 of the code, as amended by the act of March 2d, 1877, Acts 1877, p. 100, must be presented and filed either during the trial or within such time as the court may allow, not exceeding sixty days from the day judgment is entered. Exceptions, however, must be taken during the trial, but time may be allowed within the sixty days for embodying them in a proper bill.

SAME.—*Witness.*—*Opinion.*—*Non-Expert.*—*Unsoundness of Mind.*—*Evidence.*—In criminal prosecutions a non-expert witness must always state the facts upon which he bases his opinion as to the mental capacity of the defendant, and it must also appear that he has some knowledge of the acts and conduct of the defendant, to entitle his opinion to be admitted as evidence.

SAME.—*Duty of Court.*—*Jury.*—In such case, it is the duty of the court to decide whether such knowledge is shown, and such facts stated, as will entitle the witness to express an opinion, but what weight the opinion shall have is a question of fact for the jury.

SAME.—*Right of Court to Question Witness.*—A court has the right to question a witness, and no error is committed thereby unless the questions are in themselves objectionable, or are so asked as to improperly influence the jury.

SAME.—*Instructions.*—Where all the instructions, taken together, state the law applicable to the case fully and correctly, the fact that a single clause standing alone fails to do this, can not be made available to reverse the judgment.

SAME.—A single instruction entirely correct and relevant can not be declared erroneous because it does not gather up and group together all the various elements of the case.

SAME.—*Drunkenness.*—*Incest.*—Voluntary drunkenness can neither excuse nor palliate the crime of incest.

SAME.—*Instruction.*—Upon trial of a defendant charged with incest, it is not error for the court to state to the jury that a man with ordinary capacity and will power, unimpaired by disease, is bound to restrain his lustful passions.

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SAME.—*Indictment.—Instruction.—Evidence.—Jury.*—Where, in such action, the indictment charged the offence to have been committed at a specified date, but all the evidence, as well for the State as for the defendant, was directed to another and later date, reference in an instruction to the mental condition of the defendant, whose defence was unsoundness of mind, at the date named in the indictment, would not likely mislead the jury.

SAME.—“*Reasonable Doubt.*”—An omission by the trial court, in its instructions, to define the term “reasonable doubt,” unless asked to do so by the defendant, will not entitle him to a reversal of the judgment.

From the Shelby Circuit Court.

J. S. Scobey and D. Watts, for appellant.

D. P. Baldwin, Attorney General, J. L. White, Prosecuting Attorney, W. W. Thornton, O. J. Glessner, E. K. Adams and L. J. Hackney, for the State.

ELLIOTT, J.—The appellant was tried and convicted, upon an indictment charging him with the crime of incest, and prosecutes this appeal from the judgment of conviction entered against him.

One of the grounds relied upon for a reversal, by appellant’s counsel, is, that a continuance, applied for by appellant, was wrongly refused. The State insists that the record does not present this question, because the bill of exceptions was not presented to the judge during the trial. The record, as we read it, shows that the application for a continuance was made and refused on the 1st day of June, 1881; that, on the 7th day of the same month, immediately after the overruling of appellant’s motion for a new trial, and before the rendition of judgment, the bill was filed. The State contends that the act of 1877 imperatively requires that all bills of exceptions shall be presented at the trial. The act referred to reads thus: “All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered, signed by the judge, and filed

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by the clerk. The exceptions must be taken at the time of the trial." We are not willing to adopt such a strict and rigorous construction as that for which the State contends. The meaning of this provision is, that the bill shall be presented and filed either during the trial or within such time as the court may allow, not exceeding sixty days from the day judgment is entered. *Jenks v. The State*, 39 Ind. 1. Exceptions must be taken during the trial, but the court may allow time, within the period limited by statute, for embodying the exceptions in the proper bill. The question as to the correctness of the ruling denying a continuance is not, however, properly saved. The affidavit is not incorporated in the bill of exceptions. Parts of the affidavit are set forth, and it is recited that the affidavit is copied into the record at another place. An affidavit can only be made part of the record by a bill of exceptions, and a bill of exceptions can only incorporate an instrument by reference, when the instrument referred to is already properly in the record. *Black v. Daggy*, 13 Ind. 383; *Miles v. Buchanan*, 36 Ind. 490; *Stewart v. Rankin*, 39 Ind. 161; *Smith v. Lisher*, 23 Ind. 500; *Douglass v. The State*, 72 Ind. 385. It is not necessary to copy an instrument in the bill of exceptions, when it is already properly in the record; but when the instrument is not properly part of the record, although therein copied by the clerk, it must be set forth in the bill of exceptions as the statute requires.

The appellant's counsel, by the error alleged upon the ruling denying a new trial, present a number of questions. The court, over the objection of appellant, permitted several witnesses, called by the State, to express opinions as to the appellant's mental capacity. Counsel assail this ruling upon the ground that the witnesses were not experts, and that they had not shown sufficient knowledge of the acts and conduct of the appellant to entitle them to testify as to their

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opinion of the sanity or insanity of the accused. It is true that a non-expert witness must always state the facts upon which he bases his opinion as to the mental capacity of a defendant in a criminal prosecution, and it is also true that it must appear that he has some knowledge of the acts and conduct of the person upon whose mental condition he declares his opinion. The extent of this knowledge has never been defined, and we can not frame any general rule which will determine just how much or how little knowledge will entitle the witness' opinion to admission. If the witness' knowledge is meagre, his opinion will have but a weak foundation, and ought not to have very great weight with the jury. A witness, who has a thorough knowledge of the acts and conduct of a person whose mental capacity is the subject of investigation, ought, all other things being equal, to be able to give a much better opinion than one who possessed a scanty and slender knowledge; but what weight the opinion shall receive is a question of fact for the jury. The court can not decide whether the opinion is of much or little weight; its duty is merely to decide whether such knowledge is shown and such facts stated as entitle the witness to express any opinion at all. The witnesses who were allowed to express opinions in the present case did all show knowledge of the acts, declarations and conduct of the appellant, and there was no error in allowing them to state their opinions to the jury.

Counsel complain that the court, in several instances, interrogated witnesses. There was no error in this. The court has a right to submit questions to a witness, and, unless the questions are in themselves objectionable, or are so asked as to improperly influence the jury, no error is committed. The court would not, of course, be warranted in assuming the duties of counsel, but has a right, when the testimony of a witness is not clearly understood, or when, for the pur-

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pose of ruling intelligently upon a question, an explanation is needed, or a fuller answer required, to ask questions of the witness. We see nothing in the record before us indicating that the court, in any way, wrongfully prejudiced the rights of the appellant by the questions asked witnesses.

The appellant's counsel complain of the seventh instruction, and assert that it does not fairly state the law, because it contains this clause: "And if, at the time of committing said alleged act, he was a person of unsound mind, then you should acquit him."

The ground of complaint is, to use the words of counsel, "The court should have told the jury that, if there was a reasonable doubt of appellant's sanity, he should be acquitted." In a subsequent instruction, the jury were plainly and directly told that the appellant was entitled to an acquittal if the evidence engendered a reasonable doubt upon the question of his mental capacity. It is clear that, taking the instructions together, and it is proper to so take them, the law upon this point was correctly stated to the jury. It would be almost impossible, in a complicated case, for all the relevant rules of law to be stated in one instruction. At all events, it would be unreasonable to expect or require that each separate instruction, standing alone, should fully and correctly state the principles of law applicable to the case.

In the eighth instruction the jury were told, in substance, that voluntary drunkenness neither excused nor palliated an offence such as that with which the accused was charged. This was right. Voluntary drunkenness can not be used as a shield to ward off punishment for a crime of such a character as that charged against the appellant. The instruction under immediate mention also told the jury that a man with ordinary capacity and will power, unimpaired by disease, was bound to restrain his lustful passions. The counsel for

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appellant contend that this is not the statement of a rule of law, and that it prejudiced appellant's cause. The statement of the court was correct, although probably so plain a rule of common sense as well as of law, as to have been unnecessarily embodied in an instruction, but, however this may be, it was not error to state it to the jury.

It is also urged against this instruction, that it does not refer to the fact that the accused had been afflicted with epilepsy for more than twenty years. If the accused had desired an instruction upon this point it should have been asked. The instruction, as given by the court, is correct as far as it goes, and we can not pronounce it erroneous because it does not advert to a distinct and independent element of the appellant's defence. *Carpenter v. The State*, 43 Ind. 371; *Jones v. The State*, 49 Ind. 549. An instruction entirely correct and relevant can not be declared erroneous because it does not gather up and bind together all the various elements in the case. The instruction under examination does not purport to direct attention to particular facts, nor to recapitulate the evidence ; it professes only to state abstract propositions of law.

In criticism of the twelfth instruction, it is said that it is erroneous because it speaks of the mental condition of the appellant at the time the State charges the offence to have been committed, and that this must have misled the jury, because the indictment charges the offence to have been committed on July 25th, 1880, and the evidence shows that if committed at all, it was committed on the 11th of February 1881. We do not think that this inaccuracy could possibly have done the appellant any injury. All the evidence given by the State, both in chief and upon rebuttal, was directed to February 11th, 1881. The whole body of appellant's evidence was also directed to that date. The attention of the jury was, therefore, fully directed to February, 1881, and

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it is hardly conceivable that they could have supposed that they were bound to look to a date of which no witness had spoken, and toward which no circumstance pointed.

Lastly, it is urged that the instructions of the court are erroneous, and the appellant entitled to a reversal, because, although the court often speaks of a reasonable doubt, no definition of the meaning of that term was given to the jury. The omission of the court to define the term "reasonable doubt" does not entitle the appellant to a reversal. If counsel desired an instruction upon that subject, it was their duty to have asked one. If the proper instruction had been asked and refused, then there would have been just ground of complaint. Where there is such an omission as that of which counsel here complain, the attention of the trial court must be directed to it, before the jury retire, and an opportunity afforded to supply it by the proper instruction. *Murray v. The State*, 26 Ind. 141; *Blacketer v. House*, 67 Ind. 414.

We have now examined every point made in the elaborate brief of counsel except that made upon the evidence, which yet remains for consideration. The evidence has been carefully read, and we find that the verdict is so fully supported that we should not be warranted in disturbing it. We are not at all sure that if the case were before us as a trial court we could, under the evidence, reach a conclusion different from that reached by the jury and judge before whom the trial was had. As an appellate court we have not the slightest hesitation in sustaining the verdict upon the evidence.

Judgment affirmed.

Elam v. The State, *ex rel.* Taylor.

No. 9737.

ELAM v. THE STATE, EX REL. TAYLOR.

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CRIMINAL COURTS.—*Marion Criminal Circuit Court.—Prosecuting Attorney.*—*Statute Construed.*—*Constitutional Law.*—Under sections 7 and 8 of “An Act concerning Criminal Courts,” Acts 1881, p. 111, the Marion Criminal Circuit Court became the Criminal Court of Marion county, organized under section 1, and its prosecuting attorney, on September 19th, 1881, continued in office, and will continue to be the prosecuting attorney thereof, under section 3, article 15, of the constitution, until his successor shall have been elected and qualified.

SAME.—*Successor’s Election.*—*Nineteenth Judicial Circuit.*—In such court the successor will be the prosecuting attorney of the Nineteenth Judicial Circuit, elected and qualified after the act took effect.

SAME.—*Prosecuting Attorney Elected Before April 12th, 1881.*—T., who was elected and qualified as such prosecuting attorney before the enactment of the act approved April 12th, 1881, did not become the successor of E., who had been elected in 1878, and was holding September 19th, 1881, beyond his term of two years, because of the failure of the electors of Marion county to elect, or vote for, his successor in October, 1880.

QUO WARRANTO.—*Pleading.*—*Information.*—*Answer.*—*Demurrer to Carried Back.*—Where an information shows that the relator has no interest in the office in controversy, or its salary, fees and emoluments, and that the incumbent is lawfully in possession, his demurrer to the answer, reciting the same facts in substance, should not only be overruled, but, as it searches the record, should be carried back and sustained to the information.

From the Marion Circuit Court.

T. A. Hendricks, C. Baker, O. B. Hord and A. W. Hendricks, for appellant.

E. F. Ritter, L. Ritter and A. F. Denny, for appellee.

Howk, C. J.—This was an information, in the nature of a *quo warranto*, filed by the appellee’s relator, Newton M. Taylor, Esq., against the appellant, John B. Elam, Esq., to determine their respective titles to the office of prosecuting attorney of the Marion Criminal Court. To the relator’s information the appellant answered in two paragraphs, to each of which paragraphs the relator’s demurrer, for the alleged insufficiency of the facts therein to constitute a defense to the information, was sustained by the court, and to

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each of these rulings the appellant excepted. Declining to amend or plead further, judgment was rendered against the appellant, and in favor of the appellee's relator, in accordance with the prayer of his information; and from this judgment this appeal is now here prosecuted.

Errors have been assigned by the appellant, in this court, which call in question the correctness of the decisions of the circuit court in sustaining the relator's demurrers to each of the paragraphs of answer. Before considering any of the questions presented for our decision by either of these errors, we deem it necessary to a proper understanding of the case that we should briefly state "the facts which constitute the grounds of the proceeding" of the appellee's relator, as the same are set forth in his information. At the October election, in 1878, the appellant was duly elected to the office of prosecuting attorney of the "Marion Criminal Circuit Court," for the term of two years from and after the 22d day of October, 1878, on which day he qualified and entered upon the discharge of the duties of his office, and from and after said last named day, the appellant continued in the possession of said office, and in the discharge of its duties, although he had never been re-elected or appointed thereto, until the 19th day of September, 1881. The relator further said that, by the provisions of an act of the General Assembly of this State, entitled "An Act concerning Criminal Courts," approved April 12th, 1881, which act took effect on the 20th day of September, 1881, the said office was abolished, as was also the said Marion Criminal Circuit Court, and a new court was created, to wit, the Marion Criminal Court; that, by said act, all the business and jurisdiction of said criminal circuit court were transferred to said criminal court; that, by the provisions of said act, the said criminal court became one of the courts within and belonging to the Nineteenth Judicial Circuit, in this State, and the duties, privileges and emoluments of prosecuting the pleas of the State, in the said

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criminal court, devolved upon the prosecuting attorney of the Nineteenth Judicial Circuit. The relator further said that, on the 12th day of October, 1880, he was eligible and was duly elected to the office of prosecuting attorney of said Nineteenth Judicial Circuit, then and since composed of the counties of Marion and Hendricks; that he was duly commissioned, and had lawfully qualified, as such prosecuting attorney, and afterward, on the 27th day of October, 1880, had entered upon, and had since continued in, the discharge of the duties of said office; and that, as such officer, it was his duty and privilege to prosecute the pleas of the State in said criminal court.

The relator further said that, on the 20th day of September, 1881, the appellant wrongfully and unlawfully took possession of the office of prosecuting attorney of said criminal court, and assumed the duties and privileges of said office, and still continued so to do; and that, on ~~said~~ last named day, the relator demanded of the appellant that he should desist from all claim to said office, and cease to perform its duties, which he refused to do, and asserted his lawful right to hold possession of said office, and to discharge the duties and receive the proceeds thereof, to the great damage and injury of the relator. Wherefore, etc.

In the first paragraph of his answer the appellant admitted that, on the 8th day of October, 1878, he was duly elected prosecuting attorney of the Marion Criminal Circuit Court, and afterward qualified as such prosecuting attorney, and entered upon the discharge of the duties of said office; that he had ever since continued in the possession of said office and in the discharge of its duties; that the relator was duly elected and qualified as prosecuting attorney of said Nineteenth Judicial Circuit, and had ever since been in the possession of said office and in the discharge of its duties; and that, on the 20th day of September, 1881, the relator demanded of him, the appellant, that he should surrender the posses-

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sion, duties and emoluments of his said office of prosecuting attorney of said criminal circuit court to the relator, which he, the appellant, refused to do, and all as alleged in the relator's information.

But the appellant alleged that, at and before the time of holding the regular October election, in 1880, in said Marion county, it was generally believed by the people and the county officials, that the term of appellant's office, to which he had been elected in October, 1878, was for four years instead of for two years, and that there would be no election for a successor to him in said office until the general election in 1882, and that, therefore, no notice was given of such an election, and no election was held, and no votes were cast, for his said office of prosecuting attorney of said criminal circuit court, and that no successor to the appellant, in said office, had ever been at any time elected or qualified. Wherefore the appellant said that, by virtue of the constitution of this State, in such case made and provided, he had continued, and did still continue, rightfully, in the possession of said office, in the discharge of its duties, and in the enjoyment of its emoluments.

From the foregoing summary of the relator's information, and of the first paragraph of the appellant's answer thereto, it will be readily seen, we think, that there is no substantial difference between the parties in regard to any of the material facts of this case; but that they differ *toto caelo* in their respective views of the law which must govern and control the decision of the court upon those facts. There can be no doubt, as it seems to us, that, under the facts of this cause alleged and admitted, and under the law of this State applicable thereto, the appellant was the prosecuting attorney, both *de facto* and *de jure*, of the Marion Criminal Circuit Court, from the time of his election and qualification as such officer, in October, 1878,

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until the 19th day of September, 1881, when the act entitled "An Act concerning Criminal Courts," approved April 12th, 1881, took effect and became a law in force. It is true that the appellant's term of office, as such prosecuting attorney, was a term for two years, under the statutes of this State applicable to such office, and no longer. *Hench v. The State, ex rel. O'Rourke*, 72 Ind. 297. It is also true that if, at the general election in October, 1880, a successor to the appellant, as such prosecuting attorney, had been elected by the voters of Marion county, such successor would have been lawfully entitled to the possession of said office, with all its emoluments, at the expiration of the appellant's term of two years, to wit, on the 22d day of October, 1880.

But it is an admitted fact in this case, that no successor to the appellant, as such prosecuting attorney, was ever elected at the general election in October, 1880, or at any other time. In such a case, the provisions of section 3 of article 15 of the constitution of this State, are expressly applicable. This section provides as follows: "Whenever it is provided in this constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified." This provision of the fundamental law extended the legal term of the appellant, as such prosecuting attorney, and continued him in the possession of said office, both *de facto* and *de jure*, under the admitted facts of this case, "until his successor shall have been elected and qualified," or until the taking effect of the above entitled act of April 12th, 1881, on the 19th day of September, 1881. *Akers v. The State, ex rel.*, 8 Ind. 484; *Butler v. The State, ex rel.*, 20 Ind. 169; *Shannon v.*

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Baker, 33 Ind. 390; *Baker v. Kirk*, 33 Ind. 517; *Steinback v. The State, ex rel.*, 38 Ind. 483; *The State, ex rel., v. Berg*, 50 Ind. 496.

The question arises, and this is the controlling question in this case, as the same is presented upon the information and the first paragraph of the answer thereto: Did the above entitled act of April 12th, 1881, when it took effect as aforesaid, on the 19th day of September, 1881, *eo instanti* abolish the said office of prosecuting attorney, and, also, the said Marion Criminal Circuit Court? If this question must be answered in the affirmative, as the relator claims that it must be, then it is clear that, whatever may be his rights in the premises, the appellant's occupation, as such prosecuting attorney, is gone, and he, at least, has no farther claim to or interest in the emoluments of such office. It will be readily seen, however, that the proper answer to this question depends upon the construction which must be given to the provisions of the above entitled act. Doubtless, the General Assembly might have abolished both the criminal circuit court and the office of its prosecuting attorney; for both the court and the office of its prosecutor were the creatures of legislative enactment, and the power which creates certainly can destroy. But the question for our determination is not in regard to what the General Assembly might have done, but in regard to what the law-making power did, and intended to do, in and by the act under consideration.

The act is vague and uncertain in its provisions, but it is clear, we think, that, in its enactment, the Legislature intended to provide, *first*, for the organization, in such counties as might thereafter be designated by law, of a court to be called the criminal court of _____ county (according to the name of the county), and, *secondly*, for the continuance of criminal courts in those counties in which criminal circuit courts were organized and existing at the time of the passage of the act, but under the name of criminal courts.

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instead of the name of criminal circuit courts. These were the only purposes of the act in question, as it seems to us. The first five sections of the act were devoted, in the main, to the *first* of these purposes. The sixth section merely provided that a judge of a criminal court should be competent to act as judge of a circuit or superior court in certain cases, while the remaining sections of the act were exclusively devoted to the *second* of the above named purposes. These latter sections read as follows:

“Sec. 7. Criminal courts are hereby established in each of the counties of Marion, Allen and Vigo; said court in the county of Marion, shall commence its terms on the first Mondays of January and July of each year, and in the counties of Allen and Vigo, on the first Mondays of April and October. In the said counties of Marion, Allen and Vigo, respectively, the terms of said court shall continue six months, if the business shall require it, and during such times such courts, respectively, shall, at all times, be open for criminal trials and proceedings.

“Sec. 8. The criminal circuit courts of the several counties named in the last preceding section shall become criminal courts under this act, and the judges and prosecuting attorneys thereof, respectively, shall be the judges and prosecuting attorneys of the courts hereby created in said counties respectively, until the expiration of their respective terms of office, and the criminal courts hereby created shall proceed with the business of the said criminal circuit courts of said counties respectively, in the same manner as if no change had been made: *Provided, however,* That the said criminal court in Vigo county, shall cease to exist after the third Monday in November, 1882.” Acts 1881, p. 112.

The two sections, just quoted, are the only sections of the act under consideration, in which any direct reference is made to the criminal circuit courts, previously organized and existing at the time of the act, in the counties of Marion,

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Allen and Vigo, respectively. We are clearly of the opinion, that there is no provision, either in the sections quoted or in any other section of the act, from which it can be fairly inferred even, that the General Assembly intended to abolish the existing criminal courts in either of the above named counties, except in the county of Vigo, in which county the act expressly provided, that the court should cease to exist after the third Monday in November, 1882. On the contrary, it seems to us that, upon a reasonable construction of the provisions of the act, it was manifestly the legislative intent, that the existing criminal circuit courts in the counties mentioned, after the elimination of the inapt word "circuit," from their respective names, should become, be and continue the criminal courts of the respective counties, under the said act.

In regard to the office of prosecuting attorney of the criminal courts, the only reference thereto in the above entitled act, except in the sections hereinbefore quoted, is found in the following sentence in section 2 thereof, namely: "The clerk of the circuit court and the sheriff of the county shall be clerk and sheriff of such criminal court, and the prosecuting attorney of the circuit shall, by himself or his deputy, prosecute the pleas of the State in said court." It is evident, we think, that the language just quoted does not in terms abolish the office of prosecuting attorney of the criminal circuit court, as such office might exist at the taking effect of the act; and the intention of the Legislature, in the enactment of the provision last quoted in regard to such office, can only be arrived at by construing this provision in connection with the provisions of section 8, above quoted, on the same subject. Thus construed, we have no difficulty in reaching the conclusion, that the intention of the General Assembly, in the enactment of the act under consideration, in so far as it related to or affected the criminal courts then existing in the above named counties, clearly was, that the

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status of those courts, and each of them, with the bare exception of the change of their respective names and the incidental change of the seals thereof, should be and remain as it was at the time of the taking effect of said act, and especially so as to the judges and prosecuting attorneys of such courts, then lawfully in the possession of their respective offices, who were to remain in such possession "until the expiration of their respective terms of office."

The appellant, as we have seen was the prosecuting attorney, both *de facto* and *de jure*, of the Marion Criminal Court, when the above entitled act took effect, holding such office for a term which would not expire until his successor therein was thereafter elected and qualified. Under the constitution, which alone governed and controlled the duration of the appellant's term of office, at the time of the taking effect of said act, he was then holding, and had the right to continue to hold, the said office, "until his successor shall have been elected and qualified." We need not argue, we think, for the purpose of showing that this constitutional provision made the expiration of the appellant's term of office to depend entirely upon the future election and qualification of his future successor in said office. Nor does it follow, from what we decide, that the appellant will never have a legal successor, and that, therefore, his term of office will be without limit. On the contrary, we expressly decide that his term of office will expire, whenever, after the taking effect of the act under consideration, his successor shall be elected and qualified. Under the act, as we construe it, his successor in office will be the prosecuting attorney of the Nineteenth Judicial Circuit, who may be elected and qualified as such after the act took effect, but not the appellee's relator who, by his own showing, was elected and qualified as such prosecuting attorney, not only before the taking effect, but before the passage even, of the act in question. Surely it can not be said, with any degree of legal accuracy, that the appel-

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lee's relator became or was the appellant's successor in office.

We are of the opinion, therefore, upon the case made by the information and the first paragraph of the answer thereto, that the relator's demurrer to said paragraph of answer ought not only to have been overruled as to said paragraph, but, as it searched the record, to have been carried back and sustained by the court to the relator's information. It seenis to us, that the information was hopelessly bad, for two good and sufficient reasons : 1. Because it showed, that the appellant was the prosecuting attorney, both *de facto* and *de jure*, of the said criminal court, and lawfully in the possession of such office, at the time the above entitled act took effect, and that his term of office, then existing, had not since expired ; and, 2. Because it showed, that the appellee's relator had not, either at the time of the taking effect of said act or at any time since, any title whatever to, or any right to the possession of, or any interest in, the office in controversy, or its salary, fees or emoluments.

Our conclusion, in regard to the insufficiency of the relator's information, renders it wholly unnecessary for us to extend this opinion, in the examination and decision of any other question presented by the record of this cause.

The judgment is reversed, at the costs of the appellee's relator, and the cause is remanded, with instructions to overrule the demurrer to the first paragraph of answer, and to carry it back and sustain it to the information, and for further proceedings not inconsistent with this opinion.

Gifford et al. v. Bennett.

No. 8080.

GIFFORD ET AL. v. BENNETT.

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138	101
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152	262

TRUSTS.—Married Woman.—Sheriff's Sale.—Husband and Wife.—Where a husband purchases land with his wife's means, and takes the title in his own name without her consent, he holds it in trust for her. As between them, she is the owner, and is so as against all persons acquiring an interest therein with notice of her equity; but the title of a purchaser at a sheriff's sale of land thus equitably owned by a married woman, sold upon a judgment against the husband, if made for value and without notice of the trust, is protected by section 2 of the act concerning trusts and powers, 1 R. S. 1876, p. 915.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, W. R. Fertig and D. Waugh,
for appellants.

J. O'Brien and M. Garrigus, for appellee.

BEST, C.—This suit was brought by the appellee against the appellants, in the Tipton Circuit Court. In the complaint it was averred, in substance, that Ambrose Bennett, the appellee's husband, in 1865, at her request, purchased for her the land in dispute, situate in Tipton county, Indiana, and paid for it with means furnished by her; but, in violation of his duty, and without her knowledge or consent, took an absolute conveyance of the same in his own name, and still retains it; that, immediately after the purchase, she took possession of the land, and has since continuously occupied it. It was further averred that a judgment was recovered against her husband in the Tipton Circuit Court, on the 21st day of May, 1875, for sixty-nine dollars and costs; that afterward an execution issued upon such judgment was levied upon said land, which was, on the 7th day of July, 1876, sold by the sheriff of said county to the appellant Annie for \$127.35; that, in July, 1877, she received a sheriff's deed for the land, and was claiming the title. Prayer, that the appellee be adjudged the owner, and that a commissioner be appointed to convey to her the title.

Gifford et al. v. Bennett.

A demurrer for want of facts was filed, and overruled to this complaint, to which an exception was reserved.

The cause was then sent on change of venue to the Hamilton Circuit Court, where the appellant Annie filed an amended answer. In this answer she admitted that her title was derived through such sheriff's sale, and, in support thereof, averred, in substance, that the title to such land had been in the name of Ambrose Bennett for more than twelve years, and that during all that time he had been in the possession of the land, occupying and cultivating it, and was at the time of the sale ; that, to satisfy the writ, he had turned out the land to the sheriff, in the presence and with the knowledge and consent of the appellee ; that she stood by at the sheriff's sale and permitted the land to be sold without disclosing her title, and thus induced the appellant to purchase the same at such sale, and pay therefor \$127.35, which she did in good faith and without any notice of the appellee's claim.

A demurrer for want of facts was sustained to this answer, to which an exception was taken, and, appellants declining to further plead, final judgment was rendered against them in accordance with the prayer of the complaint. From this judgment they appeal, and assign as error the order of the court in overruling appellants' demurrer to the complaint and in sustaining the appellee's demurrer to the answer.

Ambrose Bennett, having purchased the land for the appellee, paid for it with her means, and taken the title in his own name without her consent, held it in trust for her. As between them she was the owner, and so was she as against all persons acquiring an interest therein with notice of her equity. Her husband, however, had the legal title and held the estate in trust for her. In such case, it is provided by sec. 2, 1 R. S. 1876, p. 915, that "No such trust, whether implied or created, shall defeat the title of the

Gifford *et al.* v. Bennett.

purchaser for a valuable consideration, and without notice of the trust.''

The averments of the answer bring the appellant clearly within the provision of this section, and, if true, her title, acquired through such sale, can not be defeated by such trust as the appellee asserts. The title of a purchaser at sheriff's sale of lands equitably owned by a married woman is protected by this section, if made for value and without notice. *Catherwood v. Watson*, 65 Ind. 576.

The answer was good, without reference to the facts averred to create an estoppel. These added nothing to it, for the obvious reason that an estoppel could not be created unless the purchase was made without notice and for value, and, if it was thus made, the defence was complete without the additional facts. The case of *Behler v. Weyburn*, 59 Ind. 143, upon which the appellee relies, is not in point. The land there in dispute was not held in trust, nor was the title sought to be protected by the estoppel acquired by a *bona fide* purchaser.

We think the court erred in sustaining the demurrer to the answer, and for that reason the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things, reversed, at the appellee's costs, with instructions to overrule the demurrer to the answer.

Matheney v. Earl et al.

No. 8297.

MATHENEY v. EARL ET AL.75 531
140 161**JUDGMENT.—Justice of the Peace.—Jurisdiction of Defendant.—Garnishment.**

—**Attachment.**—A judgment of a justice of the peace, without jurisdiction of the defendant, who is absent from the State, is void; and where a judgment against an attachment defendant is void, a judgment against a garnishee under the attachment can not be enforced.

SAME.—Practice.—Where an action before a justice, in which one was summoned as a garnishee, was not a proceeding in attachment, but was so considered by the plaintiff therein and the justice, it should be treated as having been based upon, and having grown out of, an ordinary cause in attachment.

SAME — Pleading — Complaint for Injunction.—Copies of Proceedings and Judgments.—Exhibits.—Copies of the proceedings and judgments of a justice of the peace, filed with a complaint for injunction against their enforcement upon execution issued from the circuit court, do not constitute such exhibits as to become parts of the complaint.

From the Monroe Circuit Court.

J. W. Buskirk and H. C. Duncan, for appellant.

W. C. L. Taylor, for appellees.

NIBLACK, J.—This cause has been before in this court, when it was reversed for want of a sufficient complaint. See *Earl v. Matheney*, 60 Ind. 202. After it was remanded to the court below, the complaint was amended, and the defendants demurred to the amended complaint, and their demurrer was sustained. The plaintiff declining to plead further, there was final judgment against her upon demur-rer. We have, therefore, only to consider the question of the sufficiency of the amended complaint.

The complaint, as amended, stated that, on the 30th day of July, 1874, the defendants Adams Earl and Charles W. Bangs commenced proceedings, before a justice of the peace, against one Isaiah Matheney; that, on filing the complaint and commencement of the proceedings, a summons was issued against the said Matheney; that the said Matheney was, at that time, not a resident of the State of Indiana; that no other process was ever issued against him, or other notice given to him, of the pendency of said proceed-

Matheney v. Earl et al.

ings ; that the summons was not served either by reading or by copy left at the said Matheney's last and usual place of residence ; that the said Matheney had then been for six months a non-resident of this State ; that afterward, on the 4th day of August, 1874, the said justice, having no jurisdiction over the said Matheney, proceeded to hear and determine the matters alleged in the complaint, and thereupon rendered a judgment in favor of the plaintiffs, and against the said Matheney, for the sum of \$78.95 ; that, on the 27th day of July, 1874, the defendants Earl and Bangs had commenced a like proceeding against the said Matheney and one James H. Greer, before the same justice, and in like manner ; that, on the said 30th day of July, 1874, without any other notice having been given to the said Matheney and Greer of the pendency of said suit, said justice proceeded to render a pretended judgment against both the said Matheney and Greer, in the sum of \$52.44 ; that the said Greer was also a non-resident of the State of Indiana when the said last named suit was commenced against the said Matheney and him, and has so continued ever since, and that there was no appearance by, or for, either of them in either one of the proceedings set forth as above ; that, on the 30th day of July, 1874, above named, the defendants Earl and Bangs filed an affidavit, and caused a summons to be issued, notifying Mary Matheney, the plaintiff herein, to appear before said justice and answer, as garnishee, in both of said causes ; that, in pursuance of said notice, she did appear before the said justice, and was examined by him ; that said justice thereupon proceeded to render judgment against the plaintiff, in each of said causes, for the amounts of the judgments against the said Isaiah Matheney, and against him and the said Greer respectively, copies of all of which proceedings before the justice were filed with the complaint ; that, on the 10th day of July, 1875, the defendants Earl and Bangs caused said justice to make and certify a transcript of so much of the proceedings in each cause as related to the

Matheney v. Earl et al.

pretended judgments against the plaintiff as garnishee, above referred to, and to file such transcripts in the office of the clerk of the Monroe Circuit Court, and thereupon caused executions to be issued on each of the said judgments, described in said transcripts, to the sheriff of Monroe county, who levied the same upon certain lots in the town of Stinesville, in said county, and is now threatening to sell said lots, thus casting a cloud upon the plaintiff's title to the same; that, at the time of the rendition of the pretended judgments against the plaintiff, she was informed of the non-residence of the said Isaiah Matheney and of the said Greer, and knew that said judgments against her were, in consequence, void, and did not appeal therefrom; that, at the time transcripts of such judgments were filed in the clerk's office, the time for an appeal had elapsed; that, prior to the levying of said execution, and before she knew of the filing of such transcripts, she accepted an order given by the said Isaiah Matheney and by the said Greer, for the full amount of her indebtedness to them, and has since paid said order; that, if the said sheriff is permitted to sell the real estate so levied on by him, she will have to pay said indebtedness to the said Matheney and Greer a second time. Wherefore the plaintiff prayed for an injunction and general relief.

In the discussion of the facts averred in the complaint, the proceedings before the justice are alluded to as if they constituted a part of the complaint. Copies of these proceedings did not constitute such exhibits as became a part of the complaint by being filed with it, and hence such copies added nothing to, nor detracted anything from, the direct averments of the complaint. *Briscoe v. Johnson*, 73 Ind. 573; *Parsons v. Milford*, 67 Ind. 489; *Wilkinson v. The City of Peru*, 61 Ind. 1. We can, therefore, only judge of the proceedings before the justice by what the complaint alleged concerning them.

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Accepting the averments of the complaint as true, which the demurrer admitted, the judgments against Isaiah Matheney, and against him and Greer, respectively, were not binding upon them, or either of them. Whether, however, the proceedings in which those judgments were rendered show a lawful service of summons upon Matheney and Greer, or either of them, is a question we have not considered, as, for the reasons given, those proceedings *in extenso* are not before us as a part of the complaint. That is a question which would have arisen if a trial of the cause had been reached, and the proceedings before the justice had been put in evidence. The general rule is, that where a judgment against an attachment defendant is void, a judgment against a garnishee under the attachment can not be enforced. *Drake Attachment*, sec. 696; *Schoppenhast v. Boltman*, 21 Ind. 280; *Johnson v. Johnson*, 26 Ind. 441; *Andrews v. Powell*, 27 Ind. 303; *Earl v. Matheney*, 60 Ind. 202.

While the actions in which the plaintiff was summoned as a garnishee were not proceedings in attachment, the defendants Earl and Bangs, as well as the justice, seem to have proceeded against the plaintiff upon the theory that they were in fact attachment proceedings, and that the measures taken against her were but ancillary and incidental to those actions. Under these circumstances, we think the proceedings against the plaintiff before the justice ought to be treated as if they had been based upon, and had grown out of, ordinary causes in attachment; and as the allegations of the complaint make it appear that the judgments against Isaiah Matheney, and against him and Greer, respectively, were void, it follows that the judgments against the plaintiff as garnishee ought not to be enforced.

We are, consequently, brought to the conclusion that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

The Home Insurance Co. of New York v. Duke.

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No. 7331.

THE HOME INSURANCE CO. OF NEW YORK v. DUKE.

PLEADING.—Practice.—Complaint.—Defective Averment.—Substantive Fact.

—*Defects Cured by Verdict.*—A defective averment in a complaint may be cured by a verdict; but, if the complaint omits to allege any substantive fact which is essential to a right of action, and which is not implied in, or inferable from, the finding of those which are alleged, a verdict for the plaintiff does not cure the defect.

SAME.—Policy of Insurance.—Insurable Interest at Time of Delivery and of Loss.—A complaint on a policy of insurance against loss by fire is not sufficient if it show an insurable interest at the time of delivery only. It should also allege that the assured had an insurable interest at the time of the loss.

INSURANCE.—Complaint on Policy Assigned After Loss.—Insurable Interest at Time of Delivery Insufficient.—Demurrer.—The complaint on a policy of insurance assigned after loss, averring that the defendant "did insure" plaintiff's assignor "on his one-story frame house," and setting forth a copy of a policy of insurance "on his one-story frame storehouse," "his shelving, counters, desks, and scales contained in said storehouse," sufficiently shows an insurable interest in the assured at the delivery of the policy, but, failing to aver that he was interested in the property at the time of the loss, is insufficient on demurrer.

From the Henry Circuit Court.

W. H. Elliott, T. B. Redding, J. E. McDonald, J. M. Butler, F. B. McDonald and G. C. Butler, for appellant.
J. H. Mellett, E. H. Bundy and M. E. Forkner, for appellee.

BICKNELL, C. C.—The appellant insured William A. Duke against loss by fire. After a loss had occurred, the policy was assigned, by endorsement, to the appellee, who brought this suit against the appellant upon the policy. A demurrer to the complaint, for want of facts sufficient to constitute a cause of action, was overruled and the appellant excepted. An answer was filed in ten paragraphs, of which the first was the general denial. The appellee demurred to each of the other nine paragraphs, for want of facts sufficient to constitute a defence. The demurrs were sustained as to the sixth, ninth and tenth paragraphs, and overruled as to the

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second, third, fourth, fifth, seventh and eighth paragraphs, and the parties respectively excepted. The appellee replied in denial of the second, third, fourth, fifth, seventh and eighth paragraphs, and filed a second reply to the third and fourth paragraphs. To this second reply the appellant demurred for want of facts sufficient to constitute a valid reply. This demurrer was overruled and the appellant excepted. The issues were tried by the court without a jury, and there was a finding for the appellee of \$339.18. A motion for a new trial was overruled, and the appellant excepted; judgment was rendered upon the verdict, followed by this appeal. The following is the assignment of errors:

1st. The court erred in overruling the demurrer to the complaint.

The second assignment is expressly waived by the appellant.

3d. The court erred in overruling the demurrer to the second reply to the third and fourth paragraphs of the answer.

4th. The court erred in overruling the motion for a new trial.

The objection made to the complaint is, that it "contains no allegation of insurable interest in the appellee or his assignor." The complaint states that the appellant "did insure him, the said William A. Duke, to the extent of \$350 on his one-story frame house," and the policy of insurance, which is a part of the complaint, contains the following: "Do insure William A. Duke _____ on his property specified as follows: \$300 on his one-story frame storehouse _____, \$50 on his shelving, counters, desks and scales contained in said storehouse." The foregoing averments sufficiently show an insurable interest in the assured at the time of the delivery of the policy. *The Rising Sun Insurance Co. v. Slaughter*, 20 Ind. 520. But the complaint should allege that the assured had an insurable interest at the time of the loss also. *The Aurora Fire Insurance Co. v. John-*

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som, 46 Ind. 315. See, also, the forms in 2 Greenleaf Ev., sec. 404, n. 1; 2 Archbold's *Nisi Prius*, 278. It must be proved that the assured had an interest at the time of the loss, for otherwise he could sustain no loss, and would be entitled to no satisfaction and would have nothing to assign. *Lynch v. Dalzel*, 3 Bro. P. C. 497. The complaint was clearly insufficient in failing to state that William A. Duke was interested in the property at the time of the loss.

The appellee claims that, if the averment of interest was defective, it was cured by the verdict; but, as to interest at the time of the loss, here was not merely a defective averment; there was no averment. Sometimes the want of a necessary averment in the complaint is cured by a verdict. *Howorth v. Scarce*, 29 Ind. 278; *Purdue v. Stevenson*, 54 Ind. 161. And there are many cases in which a defective averment in the complaint is cured by a verdict. *Westfall v. Stark*, 24 Ind. 377; *Alford v. Baker*, 53 Ind. 279; *Shimer v. Bronnenburg*, 18 Ind. 363. But in none of the cases above cited was there any objection to the complaint by way of demurrer. Complaints have been held good after verdict, to which a demurrer would have been fatal. *Gander v. The State, ex rel.*, 50 Ind. 539; *Donellan v. Hardy*, 57 Ind. 393; *Shaw v. The Merchants National Bank*, 60 Ind. 83; *Galvin v. Woollen*, 66 Ind. 464; *Parker v. Clayton*, 72 Ind. 307. The objection in the case at bar having been taken by demurrer, the verdict will not cure the defect. Where there is not merely an imperfect statement, but no statement at all, the defect is not cured by a verdict, whether a demurrer were interposed or not, unless the omitted matter be implied in, or fairly inferable from, the facts alleged and proved. The rule is thus stated in Gould Pl., Ch. 10, sec. 22: "If the declaration omits to allege any substantive fact, which is essential to a right of action, and which, is not implied in, or inferable from, the finding of those which are alleged; a verdict for the plaintiff does

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not cure the defect. Thus *in assumpsit*, if the declaration alleges no consideration, and the jury find a verdict for the plaintiff; judgment must be arrested. For the fact, that the defendant promised, furnishes no legal intendment or inference, that the promise was founded upon any consideration."

So, in the case at bar, the fact that William A. Duke, the assured, was interested in the property when the policy was delivered, furnishes no legal inference that he was also interested therein at the time of the loss.

The court below erred in overruling the demurrer to the complaint, and the omission in the complaint was not cured by the verdict. The complaint being insufficient, it becomes unnecessary to consider the errors assigned in the subsequent proceedings.

The judgment of the court below ought to be reversed, and the cause remanded, with instructions to permit the appellee to amend his complaint.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, reversed at the costs of the appellee, and the cause is remanded, with instructions to the court below to permit the appellee to amend his complaint.

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No. 7875.

STOTSENBURG ET AL., TRUSTEES, *v.* SAME ET AL.

SHERIFF'S SALE.—Purchaser.—Judgment.—Execution.—Notice of Irregularities.—The purchaser at a sheriff's sale of real estate is required to show a valid judgment and execution, and is chargeable with notice of the character and contents of the judgment and execution under which he claims, and of the discrepancies between them, if any exist.

Stotsenburg *et al.*, Trustees, *v.* Same *et al.*

SAME.—This rule applies alike to all purchasers at such sale, whether judgment plaintiff, who is affected with constructive notice of all irregularities, or a stranger to the writ, who ordinarily can be affected only by actual notice.

SAME.—*Assignee of Certificate.*—The assignee of the certificate of sale is in no better position than his assignor.

SAME.—*Appraisement.*—A sheriff's sale of real estate is voidable, if not void, if made without appraisement, when the judgment does not so direct.

SAME.—*Sale in Solido of Land Susceptible of Division.*—A sale of real estate on execution, as an entirety, which is susceptible of division and of sale in parcels sufficient to satisfy the execution, is voidable, and may be set aside.

SAME.—*Right of Holder of Junior Lien to Set Aside.*—*Mortgage.*—*Trustee of Express Trust.*—The assignees and holders in trust of a mortgage of real estate, the lien of which is junior to that of the judgment on which such real estate was sold on execution, have such an interest as entitles them to bring an action to set aside such sale, and, as trustees of an express trust, may sue in their own names.

PRACTICE.—*Pleading.*—*Exhibits.*—Exhibits filed with a pleading, which are not the basis thereof, constitute no part of the pleading, and can not add to, or detract from, the force of its averments.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellants.

Woods, J.—Action to set aside a sheriff's sale of real estate; demurrer, by the purchaser, to the complaint, for want of facts stated sufficient to constitute a cause of action, sustained; exception saved, and judgment for the defendants.

The appellee has filed no brief, and we are not informed of the respect in which the complaint was deemed to be defective.

The appellants sued as the assignees and holders in trust of a mortgage, which was executed on the 6th day of February, 1872, to secure the payment of \$500, and had been duly recorded. The judgment, to satisfy which the sale was made, was obtained in the court of common pleas of Clark county, where the mortgaged land is situated, and constituted the prior lien. The execution was issued August 14th, 1872, containing a direction to levy the sums specified

Stotsenburg *et al.*, Trustees, v. Same *et al.*

of the property of the defendants, "without relief from valuation or appraisement laws," was levied upon the mortgaged land, and, after due advertisement, sale thereof made to the execution plaintiff for the sum of \$1,316.10, the amount of the judgment, interest and costs. The purchaser assigned his certificate of purchase to the defendant Burghard, to whom, on June 25th, 1874, the sheriff made his deed, in consummation of said sale. With the complaint is set out an alleged copy of these proceedings, the judgment, execution, return, certificate of sale, and all endorsements, but, under repeated decisions on the subject, these exhibits constitute no part of the pleading, and can not be regarded as either adding to, or detracting from, the force of the averments. *Berry v. Reed*, 73 Ind. 235; *Cress v. Hook*, 73 Ind. 177; *Tindall v. Wasson*, 74 Ind. 495; *Ragsdale v. Parrish*, 74 Ind. 191; *Briscoe v. Johnson*, 73 Ind. 573.

It is insisted that the sheriff's sale was irregular, invalid and ought to be set aside, for the following reasons:

1. That it was not ordered in the judgment that the same be executed without relief from the valuation or appraisement laws, and yet the execution commanded, and the sheriff made, a sale of the premises without appraisement.
2. That the premises consisted of several lots and parcels, easily susceptible of division, and more land was offered for sale and sold than was necessary to satisfy the writ; that "the one two-story brick double tenement building, described in the plaintiffs' mortgage, is situated on the north end of the premises sold, and the same is entirely separate and distinct from the other buildings on said premises, and was so when said levy and sale were made; that either of said tenements, with the ground on which it stood, could have been set off and separated, for the purposes of sale or use, from the rest of said premises, without injury to the interests of the parties, and was fairly worth, at the time of the sale,

Stotsenburg *et al.*, Trustees, v. Same *et al.*

the full amount of the judgment, interest and costs ; that said brick building, and the land on which it stands, treated and used as a double tenement dwelling-house, and for rental purposes, was worth, at the time of said sale, the sum of \$2,500, and could have been set off, by a line drawn east and west across said lot 204, and so sold at that time, without impairing the value or uses of the adjoining improvements, which were placed upon the middle and the southern end of said premises, and consisted of a flour-mill, machinery, fixtures, engine, boiler, building and appurtenances, all separate and distinct from said dwelling-house, said mill, with the ground on which it stood, being fairly worth in cash, at the time of the sale, the sum of \$4,000, and capable of separate sale without impairing the value or uses of said dwelling-house."

By section 381 of the civil code, it is enacted that, "When a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment," and, in so far as the execution on which the sale under consideration was made, purported to authorize a sale without appraisement, it was unauthorized and illegal. The purchaser at a sheriff sale is required to show a valid judgment and execution. *Splahn v. Gillespie*, 48 Ind. 397. It follows that he must take notice of the character and contents of the judgment and execution under which he claims, and of the discrepancies between them, if any there be. This rule applies alike to all purchasers at such sale, whether the judgment plaintiff, who is affected with constructive notice of all irregularities, or a stranger to the writ, who, ordinarily, can be affected only by actual notice. *Piel v. Brayer*, 30 Ind. 332. The assignee of the certificate of sale is in no better position than his assignor. *Hasselman v. Lowe*, 70 Ind. 414.

There can be no doubt that a sheriff's sale of real estate is voidable, if not void, if made without appraisement,

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when the judgment does not so direct. *Tyler v. Wilkerson*, 27 Ind. 450; *Reily v. Burton*, 71 Ind. 118. It is equally well settled that a sale of real estate, as an entirety, which is susceptible of division and of sale in parcels sufficient to satisfy the execution, is voidable, and may be set aside. *Tyler v. Wilkerson, supra*; *Piel v. Brayer, supra*; *Bardeus v. Huber*, 45 Ind. 235; *Bardeus v. Huber*, 60 Ind. 132; *Whisnand v. Small*, 65 Ind. 120.

The plaintiffs, as mortgagees, and holding a lien junior to that of the judgment, had such an interest as entitled them to bring the action. As trustees of an express trust, they had a right to sue in their own names. Civil code, sec. 4.

The judgment is reversed, with costs, and with instruction to overrule the demurrer to the complaint, with leave to the defendants to plead.

No. 7994.

**THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS
RAILWAY Co. v. NEWELL.**

RAILROAD.—Speed of Trains.—Velocity Practiced with Consent of Community no Criterion.—Instruction.—On trial of an action against a railroad company for injuries to the plaintiff, while riding as a passenger in a car of defendant's train, which was thrown from the track by a broken rail, or the breaking of a rail, an instruction undertaking to define a safe rate of speed by its comparison with the velocity "practiced before, with the tacit consent of the community, and without accident," assumed a false criterion. and was erroneous.

SAME.—Broken Rail.—Presumption.—Instruction.—Burden of Proof.—On such trial, it was error to instruct that "There is no presumption that the rail was broken before this train reached it, and, if the plaintiff claims that it was, the burden of proof is upon him."

SAME.—Negligence.—In such case, a *prima facie* presumption of negligence arises against the railroad company, to be overcome by proof.

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SAME.—The usual practice for a considerable period would tend to prove what speed on a road is possible, with reasonable safety.

SAME.—*Query.*—When a rail has been cracked, or broken, by a passing train, is not the company guilty of negligence in not causing it to be examined and repaired before the passage of another train?

From the Marion Superior Court.

H. H. Poppleton, J. T. Dye and A. C. Harris, for appellant.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

FRANKLIN, C.—Appellee sued appellant for injuries received while being carried on a passenger train by appellant; issue by a denial; trial by jury; verdict for appellant; motion for a new trial overruled, and judgment for appellant; appeal to general term, and judgment of special term reversed; appeal to this court, and the error assigned here is the reversal by the general term of the judgment of the special term; and this brings in review the error assigned in the general term, which was the overruling of the motion for a new trial.

The only questions presented to the court in general term, and that are insisted upon in this court, arise upon the instructions to the jury. The instructions, six, eight, ten, eleven and thirteen, given by the court, were excepted to by appellee's counsel, and upon them the court below in general term reversed the judgment in special term. Questions as to instructions five, six, seven and eight, asked by appellee's counsel, and refused, were also reserved. But as these instructions, which were refused, were substantially contained in those given by the court, and equally as favorable as the appellee asked, their refusal was harmless. *Crandall v. The First National Bank, etc.*, 61 Ind. 349; *Steeple v. Downing*, 60 Ind. 478; *The Ohio, etc., R. W. Co. v. Dickerson*, 59 Ind. 317; *The City of Indianapolis v. Gaston*, 58 Ind. 224.

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We see no error in the sixth, tenth and thirteenth instructions given. The latter clause of the eighth instruction reads as follows: "Whether the rate of speed adopted in this instance was unsafe, is for you to determine as a question of fact. The law does not fix the rate of speed at which cars may be run upon a railroad, except to require that it shall not be excessive or dangerous. Whether it is so or not, will depend, to some extent, upon the safeguards which are adopted to prevent accidents; and, in determining whether the rate was unsafe, on the occasion in question, you should consider whether the velocity was greater than *that which had been practiced before, with the tacit consent of the community, and without accident.*"

This clause in the instruction well says that the law requires that the cars shall not be run at an excessive or dangerous speed; but how is the question of excessive or dangerous speed to be settled? Certainly not by proving the tacit acquiescence of a community in a certain rate of speed, but by proving the fact as to what rate of speed would be reasonably safe in the case in controversy. No rate could be established, consistent with the idea of railroad travel, that would be absolutely safe, though it should be as near so as human wisdom and skill can reasonably make it. A safe rate of speed on one railroad line is not a definite criterion for another, unless the latter is in a similar condition to the former. What would be a safe speed on one railroad line might be a very dangerous speed on some others. The alignment and grades of a road, as well as the road-bed, superstructure and rolling stock, are all to be considered with reference to their perfectness in establishing that highest speed with which it would be safe to run cars over the road. The railroad companies have exclusive control of all these considerations, and each one establishes its own speed at its own risk, and if it establishes a dangerously high speed, it is liable for any injury resulting on account

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thereof, and can not shield itself from responsibility under the patronage and acquiescence of the community.

The fact that trains have been run over a railroad line at a high and dangerous rate of speed, without injury, is by no means conclusive that it will continue to be so, and thereby relieve the company from liability on account thereof. The tacit acquiescence in, and toleration of, a wrong for the time being, by the community, does not justify a repetition and perpetuation of the wrong.

The only authority referred to by counsel, in support of this part of the eighth charge, is the case of *Wilds v. The Hudson River R. R. Co.*, 29 N. Y. 315, from which, by the similarity of the language, this clause of the instruction appears to have been drawn. But the learned judge in making this extract from Judge DENIO's opinion in that case, omitted a very important part thereof, and that is, that "If it be clearly shown, that on the occasion in question the velocity was not greater than that which had been usually practiced for a considerable period." With this qualification, the usual practice for a considerable period would tend to prove the reasonable safety of the speed. Without this qualification, any rate of speed that had been accomplished without accident, would be a license to continue the same velocity, which certainly is not the law. The opinion of this distinguished judge, in *Wilds v. The Hudson River R. R. Co., supra*, goes to the very verge of, if not beyond, the right point upon this question. The community may, for a considerable length of time, uncomplainingly tolerate a wrong, which they are remediless to correct, without that toleration amounting to a *tacit consent* to its continuance. But it may be questionable whether that case can be considered as authority in the case under consideration. In that case the injury occurred to an outsider at a street crossing, where there was no contract for safety existing between the railroad company and the injured party. In this case

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the injured party was travelling in the company's cars, under a contract with the railroad company for safe transit. In that case there was no presumption of negligence on the part of the company arising out of the fact of the injury. In this case there was such presumption; hence the more strict proof in this case on the part of the company to rebut such presumption.

This clause in the instruction is limited to the means of determining what rate of speed would be excessive or dangerous, and does not embrace the questions as to what was the rate of speed, or whether it was excessive or dangerous. We, therefore, do not decide anything upon either of these questions.

The eleventh instruction reads as follows: "It appears that the west-bound express passed over the rail a short while before the east-bound train, in which Mr. Newell was being carried, was thrown from the track. There is no presumption that the rail was broken before this train (on which Mr. Newell was riding) reached it, and, if the plaintiff claims that it was, the burden of proof is upon him."

In order to understand the application of this instruction it is necessary to refer to the facts as established by the evidence. The injury complained of occurred by the car in which appellee was riding leaving the track, caused by a broken, or the breaking of, a rail. The injury occurred about 9 o'clock A. M. The watchman passed over the track early that morning, and caused this rail to be put in the place of another broken rail. The eastern express train had passed over the rail between the time of its being put in and the passage of the train in which appellee was riding.

Counsel for appellee insist that the rail may have been cracked or broken by the passage of the eastern express, and that the appellant was guilty of negligence in not having it examined, and repaired if injured, before the passage of the train in which appellee was riding.

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This theory of counsel may be too strong against the railroad company. To require it to examine its track between the passing of its trains, would be wholly impracticable, and a failure to do so would not be *per se* negligence. This instruction, however, does not fully come up to this proposition. This instruction is objectionable for assuming a state of facts to exist, without leaving them for the jury to determine from the evidence.

The law is well settled, that, where a passenger is injured in consequence of a train running off of the track, the law raises, *prima facie*, a presumption of negligence against the railroad company. *Curtis v. The Rochester, etc., R. R. Co.*, 18 N. Y. 534; *Edgerton v. The New York, etc., R. R. Co.*, 39 N. Y. 227; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; *Sherlock v. Alling*, 44 Ind. 184; *The Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462.

This injury occurred by the breaking of a rail in the railroad track, and, by proof of the fact that the injury occurred on account of some defect in the road, its machinery or management, the general presumption of negligence would attach to the company, and it would be required to rebut that presumption by explaining and proving that there was no negligence on its part. Now, to say that no presumption existed in relation to specific facts tending to constitute negligence, and that the onus of those facts was changed to the injured party, would be to rebut and destroy the general presumption, without any explanation or proof whatever. The company must rebut the general presumption of negligence, by proof, and to say the injured party must establish the facts, by proof, which constitute the negligence, without the general presumption being removed, would be strange logic, and certainly erroneous reasoning, and would tend to confuse and mislead the jury.

We think the court in special term erred in its instruction to the jury, for which a new trial ought to have been granted.

Dinckerlocker v. Marsh.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below, at general term, be, and it is hereby, in all things affirmed, with costs.

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No. 9731.

75	548
150	294
152	36

DINCKERLOCKER v. MARSH.

CONSTITUTIONAL LAW.—Criminal Law.—Fines and Forfeitures.—Judgments Replevied Before April 15th, 1881.—Imprisonment.—Habeas Corpus.—Statute Construed.—The act of April 15th, 1881, Acts 1881, p. 560, providing for the collection of judgments for fines and forfeitures, by the issuance of an execution, and the imprisonment of the defendant upon the expiration of the stay secured to him by the entry of replevin bail, so far as it relates to judgments replevied before that date, is unconstitutional, and a writ of *habeas corpus* will lie to release a defendant so imprisoned.

SAME.—Reply to Return.—Demurrer.—Departure.—A reply to the return to such writ, alleging the issue and levy of an execution on real estate of the replevin bail, the sheriff's neglect to return the same, that such bail, for six months after becoming so, and for sixty days after the issue of such execution, was the owner of other property, real and personal, to the value of more than one thousand dollars, on which the judgment is a lien, is a departure from the petition, and insufficient on demurrer.

SAME.—Jeopardy.—Providing for the enforcement of an existing judgment, is not creating a second jeopardy, in violation of section 14 of the Bill of Rights, 1 R. S. 1876, p. 23.

SAME.—Punishment Increased.—A punishment may be lessened, but not increased, by a statute enacted after the commission of an offence.

SAME.—Payment.—Replevin Bail.—Statute Construed.—Under the criminal code of 1852, 2 R. S. 1876, p. 407, the entry of replevin bail, as well as payment, terminated the power to imprison under a judgment of conviction.

SAME.—Ex Post Facto Law.—Contracts.—Replevin Bail.—Constitution.—The 1st and 2d sections of the act of April 15th, 1881, Acts 1881, p. 560, do not conflict with section 14, but conflict with section 24 of the Bill of Rights, and are void so far as they attempt to restore a right to imprison where that right had been fully terminated by the entry of replevin bail.

SAME.—Query.—What effect has the statute on judgments rendered before, but replevied after, that date?

From the Harrison Circuit Court.

Dinckerlocker *v.* Marsh.

W. N. Tracewell and R. J. Tracewell, for appellant.

D. P. Baldwin, Attorney General, and *W. W. Thompson*, for appellee.

ELLIOTT, J.—The appellant petitioned the Harrison Circuit Court for a writ of *habeas corpus*, alleging in his petition that the appellee unlawfully restrained him of his liberty; that the cause of such restraint is a mandate issued on the order of the prosecuting attorney of the said circuit court under the act of April 15th, 1881; that the petitioner was adjudged guilty of a misdemeanor by said circuit court on the 25th day of September, 1880, and that on that day Jacob F. Dinckerlocker replevied the fine and costs assessed against the petitioner. The restraint is alleged to be illegal, because, 1st. The 1st and 2d sections of the act of 1881 are in conflict with section 24, article 1, of the constitution of the State, and therefore void; 2d. The said sections 1 and 2 are in conflict with section 14 of article 1 of the constitution.

The appellee, in his return to the writ issued at the suit of the appellant, alleged that he was the sheriff of Harrison county; that, by virtue of a judgment rendered against appellant by the circuit court of said county, upon conviction of a misdemeanor, the appellant was committed to the jail of said county until the fine and costs assessed against him were paid; that said judgment was replevied by Jacob F. Dinckerlocker. A copy of the mandate requiring the appellee to take the appellant into custody is made part of the return.

Exceptions were entered by appellant to the return, and were overruled. After his exceptions were overruled, the appellant replied setting up, substantially, these facts: That on the 29th of December, 1880, the State caused an execution to be issued on the judgment entered against appellant and replevied by Jacob F. Dinckerlocker; that the sheriff duly levied said execution on the real estate of the said Jacob F. Dinckerlocker; that the sheriff retained said execution, and neglected to return the same; that, for six months

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after the said Jacob F. Dinckerlocker entered himself as replevin bail, he was the owner of a large amount of personal property, and continued to be the owner thereof for more than sixty days after the execution came to the hands of the sheriff ; that said Dinckerlocker, the replevin bail, was the owner of other real estate than that levied upon ; that the judgment recited in the mandate is and has been a lien on said real estate since the entry of bail, and that it is of the value of more than one thousand dollars.

The appellee demurred to this reply, and the court sustained the demurrer.

Section 1 of the act of April 15th, 1881, provides that whenever a person is adjudged guilty of a misdemeanor, and punished by fine, and the judgment is replevied, the clerk shall, upon the expiration of the stay, issue to the sheriff a copy of said judgment, with his mandate attached, and, upon the receipt thereof, "it shall be the duty of the sheriff or constable to arrest the defendant and commit him to jail unless or until such fine and costs are paid."

Section 2 of said act reads as follows : "The provisions of this act shall apply to all fines heretofore assessed, as well as to all fines hereafter to be assessed." Acts 1881, p. 560.

The Legislature has in express terms declared that the act shall have a retroactive effect, and the only question for the courts is whether the Legislature had power to make the act operate upon judgments rendered before its enactment.

The act is not invalid under the 14th section of article first of the constitution of the State, for the convicted person is not put in jeopardy twice for the same offence. The only jeopardy in which he was ever placed is that which attached to the trial in which the judgment of conviction was rendered. The act of 1881 does not require that there shall be another trial, nor does it subject the convicted person to any second danger of conviction. Providing for the enforcement of an existing judgment is not creating a second jeopardy.

Dinckerlocker v. Marsh.

The question, whether the act is in conflict with section 24 of the Bill of Rights, is a much more difficult one than that which we have just discussed. The act we are examining does not create any new offence, and can not, therefore, be said to make that a crime which was not one before its enactment. It is not, within the strict meaning of the constitution, an *ex post facto* law. But it is held that where the punishment is increased by a subsequent statute, the constitutional provision referred to is violated. The punishment may be lessened, but it can not be increased. *Strong v. The State*, 1 Blackf. 193; *Commonwealth v. Mott*, 21 Pick. 492; *The State v. Arlin*, 39 N. H. 179; *Mullen v. People*, 31 Ill. 444. The statute we have in hand does not in terms profess to increase the punishment; it only professes to provide a remedy for the enforcement of a judgment of conviction rendered before its enactment. If the statute does no more than change an existing remedy it must be upheld, for it is well settled that the Legislature may change remedies as well in criminal as in civil cases. Cooley's Const. Lim. 272; Story Const., sec. 1345, *vide* author's note. The case turns, therefore, upon the question whether the statute does do more than change the remedy existing prior to its passage.

The law as it stood prior to the act of 1881, provided that, "When the defendant is adjudged to pay any fine and costs, the court shall order him to be committed to the jail of the county until the same are paid or replevied." The right to imprison is expressly limited by this statute. If the fine is either paid or replevied, the right to imprison ceases. If the fine had been paid, there could thereafter have been no imprisonment, and the express language of the statute gives to the entry of replevin bail the same effect as is given to payment, and what is true of payment must be true of the entry of replevin bail. If payment destroys the right to imprison, so also must the replevin of the judgment. We think it would not be within the power of the Legislature to restore the right to imprison after it had been determined

Dinckerlocker v. Marsh.

by payment, and that the same rule applies to cases where the judgment is replevied. It is true that the entry of replevin bail does not, as a general rule, satisfy or discharge the judgment; it simply suspends its operation and enforcement. But, under the peculiar language of the act of 1852, the entry of replevin bail does terminate the power to imprison. The Legislature had no power to restore to life an extinct right. This is in effect what this statute attempts to do, notwithstanding it professes to do no more than change a remedy. By complying with the statute in force when the judgment was rendered, the appellant had secured immunity from imprisonment, and in our judgment the Legislature had no power to take away this immunity by a subsequent statute. When the appellant had done all that the law required that he should do to escape imprisonment, the Legislature could not deprive him of the right thus fully vested, and place him again in peril of imprisonment by giving an after-enacted statute a retrospective effect. Such a statute does more than change the remedy. It places the accused in a situation of danger, not of a second conviction, but of a deprivation of personal liberty, from which by an act fully consummated he had, according to law, completely freed himself. The case in hand falls clearly within that of *Moore v. The State*, 24 Alb. L. J 306, where the subject is very ably and exhaustively discussed. This statute is not merely a *retroactive* law, acting only upon the remedy, as was the case in *Ex parte Bethurum*, 66 Mo. 545, but is a statute attempting to add the penalty of imprisonment, from which the accused had fully relieved himself in strict conformity to the law in force when the act was committed and the judgment entered. The attempt here is not to provide for adjudging a penalty, proper and just under the law existing, when the offence was committed and judgment rendered, but to provide a penalty which the accused could not possibly have been compelled to suffer under the law existing when the judgment was rendered, and in force at the time

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he had secured himself against the possibility of legal imprisonment. The act of 1881, so far as it relates to judgments entered and replevied before it took effect, is unconstitutional. We are not called upon to decide what its effect is as applied to judgments, rendered before, but replevied after, it went into force.

The court erred in overruling appellant's exceptions to the return. The demurrer to the reply was properly sustained. There was a plain departure from the petition.

Judgment reversed, at the costs of the appellee.

WORDEN and Woods, JJ., concur in the conclusion reached, but not entirely upon the ground upon which it is placed in the principal opinion.

No. 9683.

JOHNSON v. THE STATE.

CRIMINAL LAW.—False Pretences.—Indictment.—An indictment, charging the obtaining of property under false pretences, must specify the pretences, the goods obtained, and from whom, negative the pretences, aver that the defendant knew them to be false, and show the connection between them and the fraud accomplished by their means.

SAME.—Claim Against County.—Allowance by Board of Commissioners.—

Warrant and Order to Auditor.—Payment by Treasurer.—Counts of an indictment, charging false pretences in obtaining payment of a claim against a county, which fail to accurately describe the pretences, the order or warrant issued to the defendant, to whom it was payable, for what amount it was drawn, and the connection between the false pretences relied on by the board of commissioners in allowing the claim, and the act of the treasurer in paying the amount allowed, are insufficient on motion to quash.

SAME.—Warrant and Order of Board to Auditor of County for Payment of Money.—A warrant and order of the board of commissioners, upon the auditor of the county, for the payment of money, is an instrument unknown to our law.

75	553
149	343
75	553
<u>154</u>	<u>311</u>
75	553
<u>169</u>	<u>559</u>

Johnson *v.* The State.

From the Allen Criminal Circuit Court.

S. M. Hench, for appellant.

D. P. Baldwin, Attorney General, *W. S. O'Rourke*,
Prosecuting Attorney, *A. Zollars* and *W. W. Thornton*,
for the State.

NIBLACK, J.—Abraham J. Johnson, the appellant, was indicted for obtaining property and money under false pretences. The indictment contained two counts. The appellant severally moved to quash both counts of the indictment, but his motion was overruled as to both counts. A jury found him guilty as charged, fixing his punishment at a fine and imprisonment in the State's prison for two years, and, over a motion in arrest, judgment was rendered accordingly.

The evidence is not in the record, and the only questions presented upon this appeal are upon the alleged insufficiency of both counts of the indictment.

The first count charged that the appellant, on the 17th day of March, 1881, at the county of Allen, in this State, unlawfully, feloniously and designedly, and with intent to defraud the said county of Allen, did feloniously and falsely pretend to the board of commissioners of the said county of Allen, that he, the appellant, had, before that time, suffered and sustained damages to a certain buggy, in the sum of five dollars, by said buggy falling through a bridge on a public highway in Jefferson township, in that county, by means of which false pretences, he, the appellant, did then and there feloniously obtain from said county, by its said board of commissioners, a certain warrant and order upon the auditor of said county for the payment of money, of the value of five dollars, with intent then and there to cheat and defraud the said county of Allen; whereas, in truth and in fact, the appellant had not suffered and sustained damages to said buggy, or any other buggy,

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by the same falling through a bridge in said township of Jefferson, or any other bridge in said county of Allen.

The second count was substantially similar to the first, except that it charged that the appellant had paid five dollars for repairing the alleged injury to the buggy, for which he filed with the board of commissioners an account, verified by his affidavit, against said county of Allen, and by means of which he feloniously obtained from said board of commissioners an allowance of five dollars, that amount being paid to the appellant by the treasurer of Allen county, by order of said board of commissioners.

Bishop, in his work on statutory crimes, while discussing what is necessary to make out the crime of "false pretences," at section 452, says: "It is not sufficient merely to charge the offender with having employed 'false pretences,' in the naked words of the statute, the pleader must go further and specify the pretences; so also he must specify the goods obtained, and from whom. The indictment must negative the pretences, aver that the defendant knew them to be false, show the connection between them and the accomplished fraud, and in all other respects conform to the rules of sound pleading." What is thus said is well sustained by the authorities, and has a practical application to the indictment before us. *The State v. Smith*, 8 Blackf. 489; 2 Bishop Criminal Law, sec. 460, *et seq.*; Moore Criminal Law, sec. 733; Wharton Criminal Law, sec. 2,070, *et seq.*

The first count of the indictment did not sufficiently describe the warrant alleged to have been obtained from the board of commissioners by the appellant. The amount of the warrant is not given, nor is it stated to whom it was made payable. Besides, the averment, that the warrant was an order by the commissioners on the auditor for the payment of money, was evidently an imperfect, if not a palpably mistaken, description of the paper intended to be described. We know of no authority which the county com-

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missioners possessed, in any event, to draw such a warrant upon the auditor of their county.

Conceding, without deciding, that money obtained from a county, through the medium of an allowance by its commissioners, falsely and fraudulently procured, may amount, in a flagrant case, to obtaining money under false pretences, we think it was not properly made to appear, by the second count, that the five dollars paid by the treasurer of Allen county to the appellant, was obtained by him as the result, and by means of, the allowance which he procured upon his account filed against the county.

The indictment in a case like this must charge either in direct terms, or by averments from which the inference is inevitably drawn, that the defendant knew the representations by which the injured party was deceived were false at the time they were made. Under the rules of good pleading, it is safer to aver directly in every case that the defendant knew the representations to be false.

Whether the indictment in this case made it sufficiently apparent that the appellant knew the representations charged to have been made by him were false, is a question we have neither fully nor carefully considered. See *The State v. Snyder*, 66 Ind. 203; also Wharton Precedents of Indictments, etc., forms 528 and 529, and notes. Nor have we considered the question as to whether the representations alleged to have been made by the appellant were such as might reasonably have induced the commissioners to allow and pay his claim. Our conclusion is that the motion to quash ought to have been sustained as to both counts of the indictment.

The judgment is reversed, and the cause remanded for further proceedings.

The clerk will give the proper notice for a return of the prisoner.

Gilbert et al. v. Welsch, Administrator.

No. 7766.

GILBERT ET AL. v. WELSCH, ADMINISTRATOR.

75 557
149 459

DECEDENTS' ESTATES.—Will.—Legacy.—Direction to Invest.—Bank Stock.

—A direction in a will that a legacy be put at interest must be strictly followed; and, in such case, bank stock is not a proper investment.

SAME.—Final Report.—Legatee's Exceptions.—Evidence.—Unsupported Finding.—Upon exceptions by a legatee to a final settlement report of an administrator with the will annexed, evidence that without an order of court, and without the knowledge of the legatee, he invested the legacy in bank stock, in his own name, which depreciated in value, causing a loss of a portion of the trust fund, and that he had paid the legatee the part only which remained after deducting the loss, was insufficient to justify a finding and judgment confirming his report and discharging him from his trust as to the objecting legatee.

SAME.—Administrator's Profit and Loss.—In such case, the administrator, having had opportunity of profit in the rise in value of the bank stock, can not cast the loss upon the trust estate, but must suffer it himself.

SAME.—Settlement.—Contract.—Performance.—In such case, where the evidence shows that the parties made, and in part executed, a settlement on an agreed basis, the legatee has a right to enforce full performance.

From the Clark Circuit Court.

M. C. Hester, for appellants.

C. L. Jewett and H. E. Jewett, for appellee.

Woods, J.—The appellants, who are husband and wife, filed exceptions to the final settlement report of the appellee, as administrator, with the will annexed, of the estate of John Denny. Issues of fact were formed, and a trial had, which resulted in a finding and judgment for the appellee, confirming his report and discharging him from his trust as to the appellant Agnes C. Gilbert. The only question presented here is, whether the finding is contrary to the law and the evidence. There is no conflict in the evidence, and it shows the following facts:

John Denny died testate, and by his will made a bequest to his daughter, Agnes, which was not to be paid to her so long as she remained the wife of her then husband, but was to be put at interest by the executor, and the interest to be

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paid to her in person. The terms of the will, so far as necessary to be considered, may be found in the opinion delivered in *Gilbert v. Welsch*, 51 Ind. 491, in which case it was decided that, having been divorced from her said husband, she was entitled to receive the bequest into her own possession and control. Barnett, the executor named in the will, managed the trust until June, 1874, when he made to the court a report for final settlement, showing in his hands from said legacy, for the use of said Agnes, the sum of \$1,614.63, and an equal sum for her sister Eliza, and asking to be allowed to resign the trust. This report the court approved, and ordered him to pay said sums to his successor, when appointed. Thereupon the appellee was duly appointed the successor in said trust, for both said Agnes and Eliza; but, instead of taking from Barnett the said sums in money which Barnett was ready to pay, the appellee received the sum of \$79.26 in cash, and, for the remainder, took an assignment of thirty shares, of the par value of \$100 each, of the capital stock of the First National Bank of Jeffersonville, Indiana, at and for the price of \$105 for each share. The assignment was taken by the appellee in his own name, without any trust being expressed or indicated, but with the intention to hold the stock as an investment of said legacies; and this intention was known to the officers of the bank. The bank was at the time prudently managed, and was paying five per cent. semi-annual dividends upon its stock, which was then worth in the market and in fact \$105 per share. Before receiving the stock, the appellee made careful and proper inquiries concerning its value, and took it in good faith, believing it to be a good and safe investment. Thereafter the appellee paid to the said Agnes the dividends received upon said stock, but for each sum so paid to her she gave a receipt describing it as "interest on my legacy," or "interest on my legacy of \$1,614.63," etc. In his receipt to his predecessor in the trust, the appellee had charged

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himself with that sum of money received on account of the legacy of said Agnes ; the verified final statement of Barnett, with which said receipt was filed as voucher, showed the transfer of said sum in money ; and there is in the evidence nothing which shows, or fairly tends to show, that the said Agnes knew or approved of the investment in said shares of stock. Soon after the investment was made, the bank suffered unexpected losses, equal to one-fourth of the value of the capital stock, and, in consequence thereof, the original shares were cancelled, and new stock issued to the amount of seventy-five per cent. of the old, making the new shares of par value, but resulting in a loss of nine hundred dollars of the sum invested by the appellee, of which, in his said final report, he has charged the one-half against said Agnes ; and to this charge mainly the appellants address their exceptions. The new shares of stock were also issued to the appellee in his own name. The original purchase had been made by the appellee, without an order of court therefor, and the transaction had never been reported to the court or confirmed, before the confirmation of said final report, from which this appeal is prosecuted. The evidence also shows a settlement between the parties, which, according to the testimony of the appellee, the only witness who testified on the subject, was as follows : "About the 20th day of October, 1876, after the bank stock had been reduced, and while I supposed I had to bear the loss of the depreciation, Mr. Gilbert and I agreed that I should pay him, for his wife, eight hundred dollars in cash, and should transfer to them six hundred dollars of the new stock that had been issued to me, the stock to be taken at par value. I was to retain the right to receive whatever was made on the said stock from the suspended debts due the bank. In accordance with this agreement, I paid the eight hundred dollars and transferred the six hundred dollars of bank stock to Mr. Gilbert, and took the receipt of himself and wife for fourteen hundred

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dollars. It was agreed further between us, at that time, that as soon as I should settle with the court, and find what more was due his wife, if anything, I should then pay such balance, if any. This agreement with Gilbert was made upon the supposition that I had to account for the sum of \$1,614.63, for which I had received to Barnett as so much money."

The appellants claim, upon these facts, that the loss on the bank shares is the individual loss of the appellee, because the investment was made without authority of the court, was made in his own name as an individual investment, and, if made in execution of the trust, it was in violation of the terms of the will, which required the legacy to be put at interest. On the other hand, the counsel for the appellee claim, on the authority of 1 Perry Trusts, secs. 452, 460, that the direction to put at interest, means no more than a direction to make the fund productive, and that the appellee's duty was to make an investment, without waiting for an order of court therefor. They further argue that bank stock is a proper investment, and claim that it is so held in by far the greater number of the States of the Union, wherein the courts have passed upon the question. They cite *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116; *Clark v. Garfield*, 8 Allen, 427; *Smyth v. Burns*, 25 Miss. 422; *Brown v. Wright*, 39 Ga. 96; *Hammond v. Hammond*, 2 Bland Ch. 306; *Gray v. Lynch*, 8 Gill, 403; *Murray v. Feinour*, 2 Md. Ch. 418.

There are several reasons why, in our judgment, the loss in question must be borne by the appellee. First, because, at the beginning of his trust, withholding the truth of the case from the court and the parties interested, he charged himself on the record with money not, in fact, received, and took the assignment of the stock in his own name. Further than the facts stated, there is no ground for charging any bad faith, and it is to be presumed that none was intended;

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yet, by the course pursued, the appellee, in some measure, saved the opportunity of claiming for himself the benefit of any rise in the value of the shares, and, a loss having occurred, he should not be permitted to cast it upon the trust estate. The rule, which requires that trust funds be kept separate from individual moneys or investments, can not be relaxed with safety: It is well settled, that, if a trustee deposit the trust fund in bank, in his own name, he will be charged with interest upon it, and, if a loss occur, through failure of the bank, or otherwise, he must suffer it. 1 Perry Trusts, secs. 443, 444, 468, and cases cited. It is true that, in *Richardson v. The State, ex rel.*, 55 Ind. 381, it was held that the taking of notes by a guardian, in his own name, for moneys belonging to his ward, was not conclusive proof of a conversion. On this subject, see *The State, ex rel., v. Sanders*, 62 Ind. 562; *Lowry v. The State, ex rel.*, 64 Ind. 421; *Tucker v. The State, ex rel.*, 72 Ind. 242.

But the question before us is not a question of conversion, nor one to be determined by the same test. Whether a conversion of the trust money or property has occurred, depends somewhat upon the intention of the trustee in doing the act which is claimed to constitute the conversion, as well as upon the nature and consequences of the act, but the rule which holds the trustee personally responsible for losses incurred of money deposited or invested in his own name, rests, as we conceive, upon different considerations. By deposits and investments in his own name, the trustee obtains advantages by way of personal credit and otherwise, to which he is not justly entitled, and good policy, with a view to the faithful conduct of those who are made trustees, requires that they should, in such a case, take the risk of loss, and, that there should be no inquiry permitted into the good faith of such transactions, the secret springs of which, in most cases, it would probably be impossible to discover.

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In the second place, the provision of the will, that the legacy should be put at interest, is equivalent to a direction that the fund be either loaned at interest, or invested in an interest-bearing security. The law is, that such directions in a last will or testament must be strictly followed. 1 Perry Trusts, secs. 452, 460, 461. It can not be properly said that shares of capital stock in a bank are interest-bearing securities. Dividends, customarily at least, are declared at the will of a board of directors. They may be small or great, or, if emergencies require, may be omitted entirely. But interest is a matter of contract, certain in amount and in the terms of payment, and always enforceable by the ample remedies of the law, if the loan or investment be prudently made.

In the third place, the evidence shows that the parties made, and in part executed, a settlement between themselves, on a basis inconsistent with the position now taken by the appellee. That settlement was made upon the understanding that the appellee was accountable for \$1,614.63 in money, and, upon that understanding, the appellants consented to accept of him, in part payment, \$600 of his new bank stock. That stock is not money, and may or may not be, or have been, worth the price at which it was taken but, having accepted it of the appellee on the theory that he must account for the sum named, they have the right to have the account adjusted on that basis.

Exception is also made to some small items of costs paid by the appellee, but we do not find that any error has intervened in reference thereto.

A motion to dismiss the appeal in this case has been filed. In this respect, the facts are substantially the same as in *West v. Cavins*, 74 Ind. 265, and, in accordance with the decision made in that case, the motion must be overruled.

The judgment is reversed, with costs, and with instructions to grant a new trial.

The State, *ex rel.* Buck et al., v. Trout et al.

No. 7397.

THE STATE, EX REL. BUCK ET AL., v. TROUT ET AL.

REPLEVIN BAIL.—*Failure of Justice to Attest Entry.—Damages.*—The failure of a justice of the peace to attest the entry of replevin bail does not relieve the bail from liability, and such failure of the justice is not such a breach of his official bond as would authorize the recovery of substantial damages.

SAME.—*Nominal Damages.*—*Supreme Court.*—The Supreme Court will not reverse a judgment where the sole question is as to the right to recover purely nominal damages.

From the Boone Circuit Court.

J. W. Clements and T. J. Terhune, for appellants.

R. W. Harrison and B. S. Higgins, for appellees.

ELLIOTT, J.—This action was instituted by the relators upon the official bond executed by Trout, one of the appellees, for the faithful discharge of the duties of the office of justice of the peace. The breach assigned is that the said Trout negligently omitted to attest the entry of replevin bail upon a judgment rendered by him as a justice of the peace in relators' favor, and thereby caused the relators to lose the amount of their judgment. The action is rested upon the theory constructed by the cases of *Houglund v. The State, ex rel.*, 43 Ind. 537, and *Fentriss v. The State, ex rel.*, 44 Ind. 271. These cases have been overruled, and the doctrine declared by them exploded. We are fully satisfied that they were rightly overruled, for we are sure that they were radically unsound.

Under the rule declared in the later cases, and which we fully approve, the failure of the justice to attest the entry of replevin bail does not relieve the bail from liability. He is as fully bound as though the justice had made the formal attestation. *Miller v. McAllister*, 59 Ind. 491; *Eltzroth v. Voris*, 74 Ind. 459. As the omission of the justice was of a mere formal act, which in no wise impaired the

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undertaking of the replevin bail, it can not be said that he was guilty of such official misconduct as caused appellant any legal injury. If he was guilty of non-feasance at all, it did the appellant no actual injury, and the utmost that could be recovered would be merely nominal damages. Upon the theory that the complaint shows facts, a question we do not decide, which entitled the appellant to nominal damages, we can not reverse; for it is well and rightly settled, that there can be no reversal in cases where the sole question is as to the right to recover purely nominal damages.

Judgment affirmed.

No. 7549.

FIGART v. HALDERMAN ET AL.

SUPREME COURT.—*Presumption.—Record —Complaint.*—Where a sufficient complaint is found in the record, with nothing showing that it is not properly there, the Supreme Court will presume that it came into the record regularly and rightfully.

VENDOR AND PURCHASER.—*Mortgage.—Lien.—Conveyance.*—Where a purchaser of real estate assumes to pay a mortgage thereon as a part of the purchase-money, obtains possession under the conveyance containing the contract of assumption, in which the mortgage is accurately described, such purchaser can not, in an action to reform and foreclose the mortgage, defeat the lien thereof by showing that the real estate was inaccurately or imperfectly described in the mortgage.

SAME.—*Right to Reform Deed.*—The conveyance of real estate by an inaccurate or imperfect description vests in the purchaser a right to have the deed reformed and to secure the land contracted for, and he can not hold this right and defeat the collection of the purchase-money.

SAME.—*Assumption of Mortgage.—Bona Fide Purchaser.—Principal and Surety.*—One who assumes to pay a mortgage upon real estate purchased by him does not occupy the position of a subsequent *bona fide* purchaser; he is not a stranger, but a privy, and as such subject to the same equities as would prevail against his vendor. He becomes the

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principal debtor, and he whose debt he assumes occupies the position of surety.

SAME.—*Mortgagor in Possession.*—In such case, the purchaser is virtually the mortgagor in possession, and the mere delay of the mortgagee to coerce payment of the mortgage does not prejudice the rights of such purchaser.

SAME.—*Purchaser in Possession.*—A purchaser of real estate in possession can not successfully resist payment of purchase-money upon the ground that the description of the land in the conveyance is uncertain or imperfect.

SAME.—*Mutual Mistake.*—A mutual mistake of the vendor and purchaser in the description of the real estate conveyed may be corrected between the original parties or privies thereto.

From the Wabash Circuit Court.

M. H. Kidd, for appellant.

J. D. Connor and J. D. Connor, Jr., for appellees.

ELLIOTT, J.—Halderman and Brower instituted this action to reform and foreclose a mortgage, executed by Michael Wagaman. Figart, the appellant, claims to be the owner of the real estate in controversy, by purchase from the mortgagor.

The case is here for the second time. Upon the former appeal, a judgment rendered in favor of the appellees was reversed upon the ground that the complaint was bad, because it did not set out a copy of the mortgage upon which the action was founded. *Figart v. Halderman*, 59 Ind. 424. We are now asked to reverse the judgment rendered upon the second trial, because, as appellant's counsel asserts, the complaint in the record now before us is the same as that which this court pronounced bad when the case was first here on appeal. It is the duty of the trial courts to obey the rule declared by this court, and, if the complaint were the same as that pronounced insufficient, we should be compelled to sustain appellant's prayer for reversal. The record now before us exhibits, however, a complaint radically different from that pronounced defective upon the former appeal.

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The complaint set forth in the present record contains a copy of the mortgage, and is not vulnerable to the objection held fatal when the case was first here.

It is true, that the record does not show any formal amendment of the complaint, but we find a sufficient one in the record, with nothing showing that it is not properly there, and we must presume that it came into the record regularly and rightfully. The familiar rule is, that all reasonable presumptions will be made in favor of the action of the trial court, and, acting upon this rule, we must hold that the complaint, as now incorporated into the record, was duly amended by leave of court.

Appellant asserts that the description in the mortgage is so uncertain as to render it void, and that his rights can not be affected by it. We need not pass upon the sufficiency of the description, for the reason that appellant is not in a situation to defeat appellees' action upon any such ground. He assumed to pay the mortgage sued on as part of the purchase-money of the real estate bought of Wagaman, and obtained possession under the conveyance containing this contract of assumption. Where a mortgage is accurately described in the contract of assumption, thus informing the purchaser that the land he purchases is subject to the lien of the mortgage, he can not defeat the lien by showing an inaccurate or imperfect description. The conveyance vests in him a right to reform the deed and secure the land contracted for, and he can not hold this right and defeat the collection of the purchase-money. *Crawford v. Edwards*, 33 Mich. 354; *Comstock v. Smith*, 26 Mich. 306. The promise to pay the mortgage is as much a part of the consideration as are the notes of the purchaser, and it is certain that he can not defeat the collection of the latter upon the sole ground of a mere mistake in the description of the property intended to be conveyed.

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One who assumes to pay a mortgage upon real estate purchased by him does not occupy the position of a subsequent *bona fide* purchaser; and the decisions holding that a mistake in a deed can not be reformed against such a purchaser have no application to cases where the purchaser expressly assumes payment of the mortgage. The party who assumes is not a stranger; he is a privy, and, as such, subject to the same equities which would have prevailed against his vendor. The person who assumes becomes the principal debtor, and he whose debt he assumes occupies the position of surety. *Halsey v. Reed*, 9 Paige, 445; *Russell v. Pistor*, 7 N. Y. 171; *Trotter v. Hughes*, 12 N. Y. 74.

There is no force in appellant's argument, that the appellees had lost their right to have the mortgage reformed, by delay. We think that the complaint explains the delay, and we are very sure that appellant's rights were not, and could not have been, prejudiced by the delay of which he now complains. It is difficult to perceive how a mortgagor in possession, and this is virtually appellant's position, can be prejudiced by the lenity of the mortgagee in delaying to coerce payment of his mortgage. *Potter v. Smith*, 36 Ind. 231; *Harper v. Terry*, 70 Ind. 264.

The sixth paragraph of the appellant's answer alleged, *inter alia*, that there was a mistake in the description of the lands in the conveyance to Wagaman's vendor, and that the former acquired no title, and therefore conveyed none. The answer does not present a defence, for the reason that it affirmatively appears that appellant was in undisturbed possession of the land in controversy. It is well settled that a purchaser in possession can not successfully resist payment of purchase-money upon the ground that the description of the land was uncertain or imperfect. *Conklin v. Bowman*, 11 Ind. 254; *McClerkin v. Sutton*, 29 Ind. 407; *Wiley v. Howard*, 15 Ind. 169.

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The answer is insufficient because it fails to show any substantial injury to appellant. For anything that appears, the mistake in the description was one which appellant might readily have had corrected. No rights had intervened which would prevent appellant from acquiring a perfect and indefeasible title. The answer shows, when taken in connection with the undenied allegations of the complaint, a mutual mistake, and it is well settled that such a mistake may be corrected between original parties and privies. *Flanders v. O'Brien*, 46 Ind. 284; *White v. Wilson*, 6 Blackf. 448; *Sample v. Rowe*, 24 Ind. 208.

The questions presented upon appellant's counter-claim and upon the evidence are substantially the same as those already discussed, and need no further consideration.

We find no error in the record, and therefore affirm the judgment, at the costs of appellant.

No. 7932.

BRANDENBURG ET AL. v. SEIGFRIED ET AL.

REAL ESTATE.—Action to Recover.—Title.—One seeking to recover possession of real estate must recover upon the strength of his own title. **SAME.—What Constitutes Good Title.**—The title to real estate, in order to be good, must be traceable to the United States, or to a grantor in possession under claim of title.

SAME.—Failure of Proof.—On trial of an action for possession of real estate, by the widow and other heirs of B., who died intestate, an entire failure of proof, that M., from whom B.'s title is claimed to have come, entered the land, had possession, or that his grantee, S., had possession, and of the contents, tenor, delivery and continued possession of the deed of S. to B., or to B. and wife jointly, and a conflict of evidence as to its execution, justified a finding for the defendants.

SAME.—Deed of Wife.—Coverture.—Estoppel.—In such case, the defendants, having accepted a deed from the wife alone, and having put it in evidence, were not thereby estopped from disputing her title.

Brandenburg *et al.* v. Seigfried *et al.*

From the Clinton Circuit Court.

J. N. Sims, for appellants.

L. McClurg, J. V. Kent, S. H. Doyal and *P. W. Gard*,
for appellees.

Woods, J.—The only question presented for decision is whether the finding and judgment of the circuit court are in accordance with the law and the evidence. The action was to recover the possession of real estate, the plaintiffs claiming as owners in fee simple. The finding and judgment were for the defendants.

The rule is familiar that, if entitled to recover at all in such a case, the plaintiffs must recover on the strength of their own title. Under this rule the finding of the court upon the evidence adduced was manifestly right.

The title to real estate, in order to be good, must be traceable to the United States or to a grantor in possession under claim of title. *Doe v. West*, 1 Blackf. 134; *Pierson v. Doe*, 2 Ind. 123; *Huddleston v. Ingels*, 47 Ind. 498; *Steeple v. Downing*, 60 Ind. 478.

Counsel for the appellants says that the theory of the plaintiffs' case is, that Andrew Metzger entered, in the proper land-office, the land in dispute; that his patent, if ever issued, was not recorded in the recorder's office of Clinton county; that Metzger immediately assumed undisputed ownership and control of the land, and afterwards conveyed by warranty deed to Daniel Shively, who, on the 30th day of August, 1842, conveyed to Abraham Brandenburg, Sr., or to him and his wife Mary F. jointly, which deed, it is claimed, is lost, and that the plaintiffs, besides said Mary F., who is the widow, are the heirs of said Abraham, who died intestate.

There is an entire failure of proof that said Metzger entered, or ever had possession of, the land. It is shown that on the 29th day of May, 1839, he made a deed for the

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land to Daniel Shively, of Montgomery county, Ohio, but there is no evidence that said Shively ever took or held possession. There is perhaps a preponderance of evidence that Shively made a deed or conveyance of some kind for the land to said Brandenburg, or to him and his wife jointly; but whether to him, or to him and her, is uncertain. Of the contents and tenor of the instrument, and of the estate which it purported to convey, there is no evidence; and, indeed, there is a conflict of evidence, whether the alleged deed was made at all. The plaintiff Mary F. Brandenburg, and other witnesses, testified to the existence of the deed, but she alone gave evidence concerning its custody, saying that it was kept in the possession of herself and husband, in a bureau, until a certain time, when it went into the hands of her son Abraham Brandenburg, Jr., who had never returned it; but the son swore that he never received, saw or knew of such a deed, and did not believe it had been made. It is plain upon this state of proof, that we can not disturb the finding of the court below upon the question of title.

The defendants, however, put in evidence a deed for the land, made on the 24th day of November, 1859, by said Mary F. Brandenburg to the defendant Seigfried. At the time of making said deed, said Mary was a married woman, and her husband did not join in making the deed. The deed recites a consideration of \$1,000, paid by the grantee to the grantor. The other defendants, besides said Seigfried, claim under him. Upon these facts, the counsel for the appellants say: "We insist that, by introducing the deed of Mary F. Brandenburg to Seigfried, the defendants staked their defence on its sufficiency, and waived all other defences."

If the proof had shown said Mary in possession, claiming the land as her own when she made that deed, and, that the defendants obtained possession under and by virtue of it, there would be strong support for the proposition. By rea-

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son of her coverture, the grantor would neither be bound by her deed nor estopped by her acts in receiving the purchase-money and delivering the possession; and so the grantees would be left in the position of intruders upon her prior possession and consequent superior right. *Behler v. Weyburn*, 59 Ind. 143; *Williams v. Wilbur*, 67 Ind. 42. But, however this may be, it is clear, upon the facts stated, that the defendants are not estopped from disputing the title of said Mary on account of having accepted her deed, and having put it in evidence. For aught that appears, they may have long held and claimed the property as their own, and may have accepted her deed solely for the purpose of putting at rest an adverse claim, and, this being so, no estoppel could arise out of the transaction.

The judgment is affirmed, with costs.

No. 8131.

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125	345
75	571
133	344
75	571
134	117
75	571
137	214
139	630
75	571
145	204
75	571
152	256
152	259
152	262

TRUSTS.—Implied or Parol Trust.—Express Trust.—An implied or parol trust can not be created by putting money in the hands of another, to be invested in land for the use and benefit of a third person. This can only be done by an express trust in writing.

SAME.—Good Faith Purchaser at Sheriff's Sale.—A good faith purchaser of real estate at sheriff's sale, without notice, or his assignee, will be protected from secret trusts and unrecorded liens. ELLIOTT and NIBLACK, J.J., dissent.

SAME.—Action to Enforce Parol Trust and Quiet Title.—Notice of Trust.—Demurrer.—In an action to enforce a parol trust and to quiet title to real estate, the complaint alleged that a married woman placed her separate personal property in the hands of her husband, in trust, to invest in real estate for her daughter, who invested it in the real estate in controversy, but took the conveyance in his own name, and had it

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duly recorded; that, previous to his death, for the purpose of fully executing the trust, he devised such real estate to the daughter, which will was, after his death, duly probated; that such real estate, during his lifetime, was sold on execution against him, the judgment plaintiff being the purchaser, and having no notice of such trust; that afterward the defendant purchased the certificate of sale and took a sheriff's deed for the land, with full knowledge of all the facts, under which deed he claims title. Prayer that the land be declared held in trust for such daughter, and that the title thereto be quieted.

Held, on demurrer, that the complaint was insufficient.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts, W. R. Fertig and D. Moss, for appellant.

R. R. Stephenson, for appellee.

FRANKLIN, C.—Suit by appellee, as guardian, against appellant, to enforce a parol trust and quiet the title of appellee to a certain tract of land. The complaint consisted of two paragraphs. A separate demurrer was filed to each; overruled and excepted to. Issues were formed; trial by jury commenced, and, upon the conclusion of the plaintiff's evidence, the defendant demurred to the evidence separately upon each paragraph of the complaint. The demurrer to the evidence was overruled, excepted to, and judgment against the appellant was rendered on each paragraph of the complaint.

Errors have been assigned in this court upon these rulings. The first paragraph in the complaint alleges, substantially, as follows: That Susan Rooker (the mother of appellee's ward) had two thousand dollars, in personal property, and one child, Mary, (appellee's ward); that she turned said property over to her husband, Samuel P. Rooker, in trust, and requested him to invest the same in real estate, for the benefit and use of their said daughter Mary; that said Samuel took possession of the same, converted it into money, and invested it in the real estate in controversy; that the real estate consisted of a tract of land, described by metes

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and bounds, of $36\frac{1}{2}$ x 124 rods, making $28\frac{1}{2}$ acres ; that said Samuel took the deed in his own name, on the 22d day of January, 1876, and had it duly recorded on the 29th day of January, 1876 ; that from that time to the day of his death said Samuel recognized said trust ; and, for the purpose of fully executing said trust, and securing to said ward the benefits thereof, the said Samuel, previous to his death, to wit, on the 15th day of August, 1876, made and published his last will and testament, by the terms of which he gave and devised to the plaintiff's said ward all his real estate, together with all his personal property of every nature ; which will, after the death of said Samuel, in 1877, was duly proven and admitted to probate ; that the title to said land remained in him to the time of his death, and which was the real estate described in the will ; that, during the lifetime of said testator, said real estate was sold on an execution to satisfy a judgment against said Samuel, in favor of the Farmers' Friend Manufacturing Company, and was purchased by said company for \$125, and was afterward by it sold to appellant, James I. Rooker ; that the defendant now holds and asserts legal title thereto, under and by virtue of said sheriff's deed, which was recorded June 15th, 1878 ; that said defendant is the son of said testator, and, at the time he took said assignment of said certificate and procured said sheriff's deed, had full knowledge of all the facts ; and concluding by asking that the land be declared in trust for her, and that her title to the same be quieted.

Do these facts constitute a valid parol trust? The 1st section of the act concerning trusts and powers, 1 R. S. 1876, p. 915, provides that "No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney, thereto lawfully authorized in writing." The 8th section of said act establishes implied trusts in the following cases :

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1st. Where a conveyance is taken in the name of the alienee, without the consent of the party paying the purchase-money.

2d. Where the alienee, in violation of some trust, has purchased the estate with money not his own.

3d. Where, by agreement, the party to whom the conveyance was made was to hold the land in trust for the party paying the purchase-money, or some part thereof.

The facts, as stated in this paragraph, do not clearly bring it within either of the foregoing provisions.

It is not alleged that Samuel P. Rooker took the deed in his own name without the consent of his wife, who, it is claimed, furnished the consideration money. It is not charged that he violated any trust by taking the deed in his own name. And it is not averred that he agreed to hold the land in trust for his wife, who furnished the purchase-money. An implied or parol trust can not be created by putting money into the hands of another, to be invested for the use and benefit of a third person. This can only be done by an express trust in writing. *Irwin v. Ivers*, 7 Ind. 308; *Botsford v. Burr*, 2 Johns. Ch. 405; *Barnard v. Flinn*, 8 Ind. 204; *Resor v. Resor*, 9 Ind. 347; *Gilbert v. Carter*, 10 Ind. 16; *Miller v. Blackburn*, 14 Ind. 62; *Bartlett v. Pickersgill*, 4 East, 577; *Hughes v. Moore*, 7 Cranch, 176.

The facts alleged might create a parol resulting trust in favor of Susan, the wife, who furnished the purchase-money, but not in favor of Mary, the daughter, who did not furnish any part of the purchase-money. But whether this be so or not, the 2d section of said act reads: "No such trust, whether implied or created, shall defeat the title of the purchaser for a valuable consideration, and without notice of the trust."

There is no averment in this paragraph of the complaint that the Farmers' Friend Manufacturing Co., at or before it purchased said land at said sheriff's sale, had any notice

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whatever of said trust. Alleging that appellant knew all the facts, when he purchased the land, is not sufficient. He had a right to appropriate to himself the innocence of his vendor, unless he, with notice, had previously sold the land to his vendor. But it is insisted that a good faith purchaser at a sheriff's sale is not protected from secret equities and unrecorded liens, for the reason that he takes no better title than the execution defendant held, and that he takes it subject to all the secret equities and unrecorded liens that attached to it in the hands of the execution defendant, and that he buys at his own risk. As a general rule, the purchaser of land from another individual gets no better title than his vendor had, and when he takes a quitclaim deed he also purchases at his own risk. But there are well known exceptions to this general rule, and, if he purchases from another, in good faith, without notice, whether he takes a warranty or quitclaim deed, he is protected against secret equities and unrecorded liens. He stands, in equity, in no different light when he so purchases at a sheriff's sale, and there is no good reason why the exception should not apply to that kind of a sale, the same as if he had individually bought from the execution defendant instead of buying under the execution.

While it was formerly considered the law, that the purchaser of a judgment took it subject to all the secret equities and unrecorded liens that it was liable to in the hands of the original judgment plaintiff, now, by a well defined line of decisions, in this court, it is settled that a good faith assignee of a judgment, without notice, is protected from secret trusts and unrecorded liens. See *Flanders v. O'Brien*, 46 Ind. 284, where it was decided that a mortgage can not be reformed against a good faith assignee of a judgment. This case was approved, and the same point again decided in the same way, in the case of *Wainwright v. Flanders*, 64 Ind. 306. The

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same question was so negatively decided, because the assignee had notice, in *Houston v. Houston*, 67 Ind. 276, and *Evans Nealis*, 69 Ind. 148, and was again affirmatively decided in the case of *Tuttle v. Churchman*, 74 Ind. 311.

If a good faith purchaser of a judgment is protected, by what kind of reasoning can it be fairly said, that a good faith purchaser at a sheriff's sale, under an execution issued upon that judgment, is in a worse condition than the owner of the judgment?

But let us see what the authorities are upon this subject of sheriff's sales. Rorer Judicial Sales, 2d ed., p. 339, sec. 874, contains the following language:

"Whether a *bona fide* purchaser at execution sale, he being a third person, and not the execution plaintiff, and buying without notice, will take the estate free from unrecorded deeds and prior equities, the same as an ordinary purchaser for value by private contract without notice, is a question upon which there is some conflict of authorities. But the later and better doctrine is that the execution purchaser takes the property against all such claims of which he has no notice. The general rule has been extended further, and the prevailing doctrine is, as has been seen, that the sale is equally valid as in favor of a purchase by the execution creditor."

On page 337, sec. 866, is found the further language:

"In other and numerous cases it is held that the plaintiff, as execution purchaser, is protected as a purchaser *bona fide*. In these cases, both in law and in equity, the execution plaintiff, as a general rule, when a purchaser at sheriff's sale in discharge of his own debt is protected to the same extent as third persons or strangers to the suit."

In support of the first clause in sec. 874, he cites the following authorities: *Butterfield v. Walsh*, 21 Iowa, 97; *Parker v. Pierce*, 16 Iowa, 227; *Waldo v. Russell*, 5 Mo. 387; *Jackson v. Chamberlain*, 8 Wend. 620; *Den v. Richman*, 1 Green L. (N. J.) 43; *Ohio Life Insurance, etc., Co. v.*

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Ledyard, 8 Ala. 866 ; *Orth v. Jennings*, 8 Blackf. 420 ; *Heister's Lessee v. Fortner*, 2 Binney, 40 ; *Kellam v. Janson*, 17 Pa. St. 467 ; *Wood v. Chapin*, 13 N. Y. 509 ; *Borden v. Tillman*, 39 Tex. 262.

In support of the second clause of the same section, he cites the case of *Wood v. Moorehouse*, 1 Lans. 405.

In support of sec. 866, he cites the cases of *Butterfield v. Walsh*, 21 Iowa, 97 ; *Wood v. Chapin*, 13 N. Y. 509 ; *Evans v. McGlasson*, 18 Iowa, 150 ; *Butterfield v. Walsh*, 36 Iowa, 534 ; *Twogood v. Franklin*, 27 Iowa, 239.

In this State, as far back as the case of *Sparks v. The State Bank*, 7 Blackf. 469, as against an unrecorded mortgage, BLACKFORD, J., in rendering the opinion of the court, used the following language : "Perhaps a *bona fide* purchaser at sheriff's sale under such judgment might be protected by the statute."

In the case of *Orth v. Jennings*, 8 Blackf. 420, the following language is used : "A judgment creditor is not a purchaser within the meaning of the statute, and though it is observed in *Sparks v. The State Bank*, that a *bona fide* purchaser at sheriff's sale under the judgment might be protected, it would only be to the same extent that any other purchaser would be protected, dating the purchase at the time the sale took place. Such protection would not be upon the ground of a lien relating back to the rendition of the judgment, for, as we have seen, there could be no such lien ; but it would be afforded because the purchaser at a sale under execution would possess the same rights as a purchaser of the execution defendant."

In the case of *Routh v. Spencer*, 38 Ind. 393, p. 397, a *good faith* purchaser at a commissioner's sale, under a partition proceeding, was protected from an unrecorded mortgage, in which case the court says : "We are clearly of opinion that, the said mortgage not having been recorded, and Canady having been a purchaser in good faith and for a

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valuable consideration, it is as to him fraudulent and void, and that he holds the property free from any claim or lien of such mortgage."

In the case of *Hampden v. Fall*, 64 Ind. 382, p. 388, it was held that a purchaser at sheriff's sale on the foreclosure of a mortgage given to secure the payment of certain notes, in the hands of a good faith assignee of the mortgagee without notice, was protected from a secret implied trust, by sec. 2, 1 R. S. 1876, p. 915, which provides that "No such trust, whether implied or created, shall defeat the title of the purchaser for a valuable consideration, and without notice of the trust."

In the case of *Catherwood v. Watson*, 65 Ind. 576, this same section of the statute was held applicable, and the same principle was enforced in the case of an ordinary sheriff's sale of the property of a replevin bail on a judgment.

Thus, in addition to the doctrine laid down in *Rorer* on Judicial Sales, *supra*, and the decisions from the different states therein cited, we have five distinct decisions, made by this court, extending over considerable intervals of time, all either directly or indirectly supporting the doctrine, that a good faith purchaser at a sheriff's sale is protected from the secret equities of unrecorded titles and liens, vendor's liens, and implied or created secret trusts. And no case in this court have we been able to find, in which anything to the contrary has been held.

We think this paragraph does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling the demurrer to it, for which the judgment below must be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things reversed, at the costs of the appellee; and that the cause be remanded to the court below, with instructions to sustain the demurrer to the first paragraph of

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the complaint, and for further proceedings in accordance with this opinion.

DISSENTING OPINION.

ELLIOTT, J.—I concur in the conclusion. There are two propositions stated and approved in the principal opinion to which I can not assent. The first of these is, “that a good faith assignee of a judgment without notice is protected from secret trusts and unrecorded liens.” I am firmly convinced that a judgment, whether in the hands of the original judgment plaintiff or of his assignee, is not such a lien as will displace or destroy an equity existing prior to the rendition of the judgment. It is incontestably true, that a judgment in the hands of the judgment plaintiff is only a general lien on the actual interest of the debtor, and that it is subject to all existing equities. The mere fact that an assignee buys it does not give it a new force immensely superior to that which it had in the hands of the judgment plaintiff. It seems to me that giving to a judgment in the hands of an assignee a force so vastly increased as to compel existing equities to yield to it, is annexing to the fact of assignment an unreasonable importance. I can not understand on what principle the assignment can be justly held to extend the lien of the judgment to an extent so far beyond its original proportions.

The second proposition, which I regard as erroneous, is, that a judgment plaintiff who buys at his own sale is to be deemed a *bona fide* purchaser, and the title thus acquired held to be superior to existing equities. I do not think a judgment plaintiff can be deemed a *bona fide* purchaser in such a sense as to require the subordination of pre-existing equities to his title. Nor do I believe that the purchase by him adds anything at all to his rights as against equities existing in favor of third persons. His title mounts no higher than his judgment.

NIBLACK, J., concurs with ELLIOTT, J., in his objections to the first proposition above named.

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No. 7492.

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143	204
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REAL ESTATE, ACTION TO RECOVER.—Absolute Deed as Mortgage.

Grantee of One not Grantee of Mortgagee.—Surrender of Possession.

On trial of an action to recover possession of real estate, the court erred in its conclusion of law against the plaintiff, where the special finding of facts showed that plaintiff, having a perfect title to land, conveyed it by deed, absolute in form, to secure one to whom he was indebted, and who was also indorser for him, and, while absent from the State, one P. took possession of the land, having no deed therefor from the grantee, and sold it and gave possession to the defendant, who erected a dwelling-house and made other improvements on the land, without the knowledge of the plaintiff, no surrender of possession by the plaintiff being shown, or inferable, from the facts found.

SAME.—Deed Treated as Mortgage.—Defendant may not Dispute its Character.—In such case, the deed was in effect only a mortgage, and the defendant, not claiming title under any conveyance or purchase from plaintiff's grantee, can not dispute the character of the instrument.

SAME.—Mortgagor may Reclaim.—Previous Payment or Discharge of Mortgage not Necessary.—A mortgagor by deed, absolute in form, with parol agreement to reconvey, may reclaim and recover possession of the land from one not a grantee of the mortgagee, without having paid or discharged the mortgage. *Smith v. Parks*, 22 Ind. 59, and *Wheeler v. Ruston*, 19 Ind. 334, distinguished.

SAME.—Burden of Proof.—In such case, the burden of proof is on the defendant to show that the plaintiff parted with his possession to the mortgagee by an agreement in writing, or by parol, effectually executed by actual delivery of possession.

PRACTICE.—Special Finding.—When Defective.—Venire de Novo.—The office of a special finding is to state the facts which have been proved, and, if only matters of evidence in reference to a material fact are stated, the finding is defective and may be set aside on motion for a *venire de novo*.

SAME.—Right of Possession.—Surrender.—A special finding which states the matters of evidence concerning the right of possession of a plaintiff suing for possession, instead of the fact of his surrender, is defective and will not sustain a conclusion of law and a judgment against him.

From the Hendricks Circuit Court.

J. L. McMasters, A. Boice, R. P. Parker and P. Rapaport, for appellant.

L. M. Campbell, for appellee.

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Woods, J.—Upon a special finding of the facts, the court stated a conclusion of law in favor of the appellee, and gave judgment accordingly. Whether the conclusion was correct, is the question to be decided.

The facts, as found, were substantially as follows: The plaintiff, John C. Parker, had acquired a perfect title of record to the land, to recover which he brought the action, and had held possession thereof until January 14th, 1863, when, being about to leave the State and being indebted to the amount of five or six hundred dollars to his father, John L. Parker, who was also endorser upon his obligations for considerable sums, in order to secure his father on account of said indebtedness and endorsements, executed to him a deed of conveyance of the land, absolute in form, which was duly entered of record. It was agreed and stated at the time, that the deed was to secure the debt due to the father, and to save him harmless on account of said endorsements, and that said property was not to be disturbed, unless it became necessary to do so to pay said debts, but was to be reconveyed to the plaintiff on his return. The plaintiff has made no other conveyance of the land, and, soon after the execution of this one, left the State and did not return until February or March, 1869. Shortly after the making of said deed by the appellant, William G. Parker, who was in charge of a part of the business of John L. Parker, the grantee in said deed, took possession of this land, along with other real estate in the same locality, standing in the name of said John L. Parker, and so remained in possession until some time in the year 1868, when he sold the land to the defendant and made him a deed therefor, bearing date November 20th, 1868, since which date the defendant has been in possession. John L. Parker made no conveyance of the land to William G. Parker, and the defendant never received any conveyance therefor, other than the one stated. The defendant has

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erected a dwelling-house, and made some other improvements on the land, but he did this in the absence, and without the knowledge, of the appellant. There were no improvements on the land when the defendant went into possession, except a stock-pen and a pair of scales, erected by the appellant before the making of his deed to John L. Parker.

Upon these facts the court found, as matter of law, that the plaintiff was not entitled to recover the land, and to this conclusion the appellant excepted. This ruling certainly can not be upheld on any pretence that the appellant is not shown to be the owner of the land. It is beyond dispute, upon the facts stated, that his deed was, in effect, only a mortgage, and, the defendant not claiming title under any conveyance or purchase from the grantee in that deed, is not in a position to dispute the character of the instrument.

The position on which counsel for the appellee seeks to sustain the decision, as we understand it, is, that the appellant, having executed a deed absolute in form, which imports a right of possession thereunder in the grantee, and having surrendered the possession to the grantee, in connection with the execution of the deed, and as a part of the transaction, can not reclaim the possession on a mere showing that the deed was, in fact, a mortgage, but that he must show, too, that the mortgage debt has been paid, or that the purpose of the instrument, if other than to secure the payment of a debt, has been fulfilled.

It is a statutory provision that, "Unless a mortgage specially provide, that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same." 2 R. S. 1876, p. 333, sec. 1. And the case of *Smith v. Parks*, 22 Ind. 59, is cited by counsel for the appellant, wherein this court decided, and the case of *Wheeler v. Ruston*, 19 Ind. 334, wherein it recognized the doctrine, that this statute applies to "conveyances, though absolute upon their face,

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if given as a security for a debt." The action in each of these cases was for the recovery of the land embraced in the deed (or mortgage), but with this difference from the case in hand: The grantors, or mortgagors, in those cases had retained the possession, and the mortgagees brought suit to obtain the possession under their so-called deeds, and it was held that it was competent to show, in defence, that the plaintiffs' rights were those of mortgagees only, and that, as such, they were not entitled to obtain the possession. The cases decide no more than that a mortgagee, who is not in possession, can not assert a right of possession under a mortgage which does not specially provide therefor, and this though the mortgage be in the form of an absolute deed. The deed, being in fact only a mortgage, neither gives the grantee an actual right of possession, nor carries with it an implied or constructive possession. But, stating it again, the question now made is, whether the mortgagor who has surrendered possession to the mortgagee, under the mortgage, and, presumably, as a part of the consideration of its acceptance by the mortgagee, can reclaim, and by an action recover, the possession without having paid or discharged the mortgage. Before the adoption of the code, in an action of this sort the plaintiff would not have been permitted to show that his deed was a mortgage. The action being an action at law, strictly, he would have been bound by the legal effect of the deed, according to its terms, unless, before suing in ejectment, he had obtained a decree in equity declaring the true nature of the instrument. Equitable principles are applicable to actions under the code, which was designed to simplify the remedies of parties, and to enable them to obtain, in one procedure, what before could have been accomplished only by a resort to two tribunals; but it was not intended to modify the rules of right, and permit the recovery, in the action of the code, of any relief

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on terms on which neither law nor equity would before have granted it.

Our conclusion is that the provision of the statute under consideration means simply that, by virtue of the mortgage alone, the mortgagee can not claim possession of the mortgaged premises, unless the instrument specially so provides; but it does not forbid that the parties may agree, either in a separate writing or by parol, that the possession shall accompany the mortgage; and may effectually execute that agreement, by an actual delivery of the possession under the mortgage. A parol agreement to that effect would be within the statute of frauds and not enforceable, but, if made and voluntarily executed by the parties to the extent supposed, there is no rule of law or of equity which requires, or could justify, an interference to restore the possession to the mortgagor, unless the purpose of the mortgage had been fulfilled.

It is insisted, however, that it is not found, nor inferable from the facts which are found, that the appellant surrendered possession of the land in dispute at the time of making said mortgage deed, or that it was a part of the agreement and understanding of the parties that the possession should accompany the conveyance. It must be conceded that the fact is not expressly so found, and while, perhaps, there is enough found to warrant an inference that the possession was so transferred, it can not be said to be a necessary or legal inference. The matters stated in the finding, relevant to this point, are evidence of the fact, but not conclusive.

The office of a special finding is to "state the facts" which have been proved. Civil Code, sec. 341; Code of 1881, sec. 394. And if, instead of doing this, the court states in its finding only matters of evidence in reference to a material fact, the finding is defective and subject to be set aside on a motion for a *venire de novo*. *Kealing v. Vansickle*, 74 Ind. 529.

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When a special verdict or special finding is silent in reference to any fact, it is equivalent, as is now well settled, to a finding against the party who has the burden of proof on the subject, that the fact was not proven, or did not exist. *Graham v. The State, ex rel.*, 66 Ind. 386; *Martin v. Cauble*, 72 Ind. 67; *Ex parte Walls*, 73 Ind. 95. But where, as in this case, the finding is not silent in reference to a material fact, but, instead of stating the fact itself, states only matters of evidence concerning it, it must be deemed imperfect.

It was manifestly matter of defence, and the burden of proof was on the defendant, to show that the appellant had parted with the possession of his land to his mortgagee at the time when the mortgage was made. Upon the facts which are properly found, the appellant, in the absence of a motion by the appellee for a *venire de novo*, was entitled to a judgment in his favor, and the judgment rendered against him must be reversed. But it would be unjust to order a judgment upon the finding in favor of the appellant without an opportunity given the appellee to move for a new *venire*. The motion is one which may be made at any time before final judgment on the finding.

The judgment is therefore reversed, at the costs of the appellee, and the cause is remanded, with instructions to grant to the appellee a *venire de novo*, if moved for; but, otherwise, to set aside the conclusion of law as stated, and to enter a conclusion in favor of the plaintiff, and to give judgment accordingly.

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No. 9086.

HAMILTON *v.* THE STATE.75 586
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CRIMINAL LAW.—Keeping House for Gaming.—“A House” Equivalent to “His House.”—Indictment.—It is not a valid objection to an indictment for keeping a house for gaming, etc., under the first clause of section 29, 2 R. S. 1876, p. 469, that the defendant is charged with keeping, not his house, but a house.

SAME.—“Hire of Table” Thing of Value.—Statute Construed.—Suffering gaming for “the hire of the table” is within the purview of section 29 of the statute, *supra*, and constitutes a public offence. “The hire of a table” is a thing of value, to be risked on a game of chance. WORDEN, J., dissents.

SAME.—Evidence.—Defendant’s Knowledge.—On trial of an indictment for keeping a house for gaming, evidence that, although the defendant’s saloon, bar and tables were in charge of his clerk or bartender, he was frequently present, inattentive, sitting behind the stove in a remote part of the saloon, reading newspapers, and that his tables had been so used for gaming, two years, justified the jury’s inference that he knew how the business of his saloon was being conducted, and a finding that he suffered the same to be used as charged.

SAME.—Instruction.—Money or Other Things of Value.—Chips and Checks.—An instruction, which correctly defined a wager of the money-rent of the table as gaming, was not erroneous because it added, “or * * for a wager of chips, checks, or other things of value;” but the question of the value of the chips and checks was thereby left to the jury.

From the Wabash Circuit Court.

A. Hess, A. Taylor and J. U. Pettit, for appellant.
D. P. Baldwin, Attorney General, and *M. Good*, Prosecuting Attorney, for the State.

NEWCOMB, C.—The appellant was indicted in two counts, and convicted on a jury trial, for violation of the first clause of section 29 of the act defining misdemeanors, which provides that “If any person shall keep, or suffer his or her building, arbor, booth, shed, or tenement, to be used for gaming, * * * he shall be fined not less than fifty, nor more than five hundred dollars.”

The first count of the indictment charged the defendant with keeping a certain house and room to be used, and

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suffered the same to be used, for gaming, and did then and there unlawfully allow divers persons (naming them), and other persons, to the grand jury unknown, to play the games of billiards, pool and corporal, in said house, for money, and for "the hire of the table" on which said games were then and there played, which said hire was of the value of five cents.

The second count was in the same form, but varied the charge, by stating that the game of corporal was played by the parties named and other parties to the grand jurors unknown, on a billiard table then and there kept by the defendant in said house, for certain "checks," then and there of the value of five cents each, a more particular description of which was unknown to the grand jury.

Motions were made to quash each count of the indictment, for a new trial and in arrest of judgment, all of which were overruled, and the defendant excepted.

It is objected to each count, that it does not charge in the language of the statute, that the defendant kept *his* house, etc., but *a* house. This is not a valid objection. *The State v. Hubbard*, 3 Ind. 530.

The appellant earnestly insists that the indictment does not state a public offence, and that the evidence was not sufficient to justify a conviction, on the ground that suffering parties to play upon a billiard table, where nothing is risked but the hire of the table, does not come within the purview of the statute. For authority in support of his position the appellant refers us to *Carr v. The State*, 50 Ind. 178, *Sumner v. The State*, 74 Ind. 52, *The People v. Sergeant*, 8 Cowen, 189, and *Harbaugh v. The People*, 40 Ill. 294.

In *Carr v. The State, supra*, the court did not express an opinion upon this question, but reversed the judgment below on the express ground that the indictment did not allege that the hire of the table was of any value.

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Sumner v. The State, supra, was a prosecution under sec. 74 of the misdemeanor act, and has no application to this case.

The People v. Sergeant, supra, was a prosecution at common law for maintaining a nuisance. The evidence was that the defendant kept a billiard table in his house, on which parties were allowed to play, "the loser of the rub paying for the use of the table." The defendant did not permit wagering on the result of the game, and allowed no noise to disturb the public. It was held that a house kept even for games of chance, conducted for mere recreation, was not an offence at common law, and was not a gaming house within the common law of nuisance; and that paying for the table "by the rub" was not gaming, within the meaning of the law making a gambling house a nuisance.

This case was followed in *The State v. Hall*, 32 N. J. 158, which was also a common law prosecution for maintaining a nuisance. There is obviously a wide distinction between establishing a charge of keeping a public nuisance, and sustaining a charge under the special statute on which this indictment is founded.

Harbaugh v. The People, supra, was a prosecution under a statute similar to that under which the appellant was indicted, and, in that case, it was held that permitting the parties to play for the hire of the table did not render the defendant liable. In several other States the decisions are opposed to the cases above noticed. In *The State v. Records*, 4 Harrington (Del.) 554, which was an indictment at common law for suffering a game of chance to be played about the defendant's house, on which money was bet, it was held that, if the compensation for the use of a bowling alley was made to depend on the result of the game, and the inn-keeper permitted the game to be played, with a knowledge of such risk, it was a violation of the law. In *Ward v. The State*, 17 Ohio St. 32, it was de-

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cided that "Where a party keeps a billiard table, and permits persons to play upon it, for twenty cents a game, to be paid by the loser of the game, he is guilty of keeping such table for gain, within the meaning of section 8 of the act of March 12, 1831, 'for the prevention of gaming,' * * although such keeper of the table does not permit the players, as between themselves, to bet, and neither they nor other persons do bet on the issue of the game or games, in any other manner than that the loser of the game should pay the twenty cents for the use of the table." To the same effect is the case of *The State v. Leighton*, 3 Fost. N. H. 167.

The decisions of this court have been in harmony with the cases last cited. In *Blanton v. The State*, 5 Blackf. 560, it was held that the keeper of a billiard table, though he did not play on it himself for money, nor suffer others to do so, yet, if, for a stipulated compensation per game, he allowed any persons to use it, he was liable under a statute which provided, among other things, that the keeper or exhibitor of a billiard table, for the purpose of winning or gaining money, or any other article or property of value, either directly or indirectly, should be fined, etc. *Mount v. The State*, 7 Ind. 654, was a prosecution against the accused for a violation of section 28 of the misdemeanor act, which provides that "Every person who shall, by playing or betting at or upon any game or wager, * * either lose or win any article of value, shall be fined," etc. The information charged that one Groff owned and kept a ten-pin alley for hire, and that Mount and one Miller hired of Groff the use of the alley to play one game of ten-pins, for which they agreed to pay him ten cents, and that, in pursuance of said hiring, Mount and Miller played said game, by which Mount won of Miller five cents, the half of the hire of said alley, by then and there unlawfully betting and wagering with him the said five cents on the result of the game. In the opinion delivered in the case, DAVISON, J., said: "It is insisted that

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the information does not show a case within the statute. To constitute unlawful gaming, there must be a game played, and upon its result some article of value must be lost and won. Here was such game, and the only point of inquiry is, was any article of value won by the defendant? His liability to Groff was paid by Miller, because, in the event of being unsuccessful, he had stipulated to pay it. This payment, though made to Groff, was for the use of the defendant, and the transaction was, in effect, the same as if the amount lost and won had been paid to the defendant instead of Groff, and he had received it from the defendant." It was also announced, in that case, that *The People v. Sergeant, supra*, was not an authority applicable to our statute, and could not be followed.

In *Crawford v. The State*, 33 Ind. 304, a conviction was sustained under this 29th section, when the proof was, that the players were charged twenty-five cents a game for the use of the billiard table, which was paid by the loser of the game. No question was made that this was gaming, but the objection was to the sufficiency of the proof of guilty knowledge by the proprietor of the premises.

We think that sound reason supports the authorities that hold such playing as is charged in this case to be gaming. The manifest purpose of the Legislature, in its various enactments on the subject of gaming, has been to make unlawful all games of chance by which money or other articles of value may be lost or won, and the evil effects of risking small sums on the result of skill at billiards is less in degree only than the hazard of larger stakes at other games. The weight of authority is also in favor of such construction of the statute under consideration. Both counts of the indictment were good, and the motions to quash and in arrest of judgment, were correctly overruled.

It remains to consider the sufficiency of the evidence, and an instruction to the jury which was excepted to by the de-

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defendant. Two witnesses testified for the State. No evidence was offered by the defendant. The principal points relied upon by the appellant, under the third assignment of errors, are, that playing for the hire of the table is not gambling, and that the evidence did not connect the defendant with the commission of the offence, or show knowledge on his part that his house was used as stated in the indictment. The first objection we have already considered. The evidence showed that the defendant was the proprietor of a saloon in North Manchester, Wabash county, which was in the charge of a clerk or bartender; that the defendant did not personally attend to the business of the saloon, but, during the day time, was usually engaged in running a tile manufactory and farm, out of town. Michael Sweeney testified that he had been in the defendant's saloon on an average of once a week for the past two years; that he had seen parties play billiards and pool in his saloon frequently during the last winter and fall; had seen the parties named in the indictment play billiards in said saloon; the loser of the game would pay for the use of the table, which was five cents for each player each game; after the game was played, the loser would step up to the bartender and pay for the game, and would receive a check for each person playing, which check was worth five cents at the bar; had seen other parties play there at different times, the loser generally paying the bartender for the checks; had seen the defendant in the saloon while games of pool and billiards were being played; he did not attend the bar; had nothing to do with waiting on customers; he generally took his seat behind the stove, near the north door, and seemed to be reading newspapers. When witness saw him, he paid no attention to the billiard tables, which were about forty feet from him, in the south part of the saloon. Never saw defendant back where the tables were and the playing was done, and he had not attended to the business of the saloon for over two years;

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he was proprietor of the saloon, but the bartender attended to all the business. When witness saw the defendant in the saloon, it was generally in the evening ; the bar and billiard tables were in the same room ; in the game of billiards fifteen cents was charged when two played, and the loser paid the bartender the money, and no checks were given in this game ; had frequently seen the game of billiards played in defendant's saloon when the loser paid for the game. The witness further stated that he did not know whether the defendant knew how the games were played and paid for, or not ; that he was there often, and there was nothing to prevent him from knowing ; he did not seem to be paying attention to it.

Charles Reed testified as follows : "I live in North Manchester, Wabash county, Indiana ; the defendant runs a saloon in North Manchester ; I have been in his saloon several times during the past year ; he has a bartender there, and the defendant does not stay there near all the time ; he works at his tile mill and on his farm most of the time ; I have seen billiards, pool and corporal played in his saloon ; the general rule was for the loser to pay for the game ; I have seen (naming the persons charged in the indictment to have played, etc.,) play there when the loser paid for the game ; when pool and corporal were played, the bartender issued checks, worth five cents each, and gave them to the loser, one for each player, when the loser paid for the game ; I have seen a good many other persons play there at these games in the same way ; the defendant seemed to pay no attention to what was going on in his saloon ; I frequently saw him in there, but he was generally reading a newspaper at the north end of the room ; the tables were in the south end ; the stove was between the defendant, when I generally saw him, and the tables when the games were played."

From this evidence we think the jury might well infer that the defendant knew how the business of his saloon was

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being conducted, and to find from the evidence that he suffered the same to be used for the purpose charged in the indictment. The evidence did not show an isolated case or two of gaming, or even a few cases, but that the billiard tables had been run in that way for two years ; and, although the defendant gave no personal attention to the tables or bar, he frequently was present while the playing was going on.

The instruction complained of was as follows : "The playing of billiards, pool or other games played upon a billiard table, when there is a wager of the money-rent of the table between the parties playing, or when the parties play such game for a wager of chips, checks or other things of value, in either case the playing of such game, for such wager, is gambling within the meaning of the law."

The criticism of appellant's counsel on this charge is that it was "a judicial declaration that checks and chips are things of value—a declaration the court had no right to make to the jury."

If this instruction bore the meaning given to it by appellant's counsel, it would be erroneous, as it was the province of the jury to determine from the evidence whether the checks and chips named were articles of value. But we do not so construe the instruction. The first branch of it informed the jury that a wager of the money-rent of the table was gaming. This was unobjectionable. The residue of the charge puts the hypothetical case of playing for any other articles of value, among which are named chips and checks. We think the question of value was left, by the instruction, to the jury, and that they would understand from it, that, in order to convict for allowing games to be played for "chips," they must find that such chips were things of value, for they were told that gaming consisted in playing for money or other things of value.

The judgment of the circuit court should be affirmed.

Foster v. Ward.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellant.

WORDEN, J., dissents from the proposition, that the playing named in the indictment, where nothing was risked but the hire of the table, was gaming within the meaning of the statute.

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No. 7179.

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SUPREME COURT.—*Practice.—Trial Court.—Presumptions.*—All the presumptions are in favor of the correctness of the trial court's rulings, and will be indulged by the Supreme Court, in the absence of any showing of positive error.

EVIDENCE.—*Competency of Testimony of Witness as to Value.*—On trial of an action for money due and unpaid, for feeding cattle and hogs from December 3d, 1877, to February 20th, 1878, testimony of a witness living twelve miles distant, as to the value of the corn and fodder, so fed, in the shock during December, 1877, and January and February, 1878, in his neighborhood, was competent and relevant in support of a paragraph of the complaint, accompanied by a bill of particulars containing items of the number of bushels of ear corn and of shocks of corn-fodder so fed and price of each, upon which paragraph issue was joined by general denial only.

SAME.—*Neighborhood.—Inference.*—In such case, notwithstanding the distance between the residence of the witness and that of the plaintiff, his evidence was competent, its weight being a question for the jury. There is no inference that the hogs were not fed "in his neighborhood."

From the Noble Circuit Court.

A. A. Chapin, for appellant.

Howk, C. J.—In this case, the appellee sued the appellant in a complaint of three paragraphs, for the recovery of certain money alleged to be due and unpaid. The cause, having

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been put at issue, was tried by a jury, and a verdict was returned for the appellee; and over the appellant's motion for a new trial, and his exception saved, judgment was rendered against him for the appellee, on the verdict.

The only error assigned by the appellant here is the decision of the circuit court in overruling his motion for a new trial. In this motion a number of causes were assigned for such new trial, the first of which was as follows:

"1st. The court erred in permitting the witness William D. Hays to testify as to the value of corn in the shock, in his neighborhood, during the months of December, 1877, and January and February, 1878."

In his brief of this cause, the appellant's counsel has expressly limited this court to the consideration of the question presented by this first cause for a new trial, and upon which alone he asks for the reversal of the judgment below. The appellee has not favored this court with any brief or argument in support of the rulings of the trial court.

We find it necessary to an intelligible presentation of the alleged error of law, complained of by the appellant, and of our decision of the question arising thereunder, that we should first give a summary of the appellee's cause or causes of action, as stated in the several paragraphs of his complaint. In the first paragraph the appellee declared upon a special contract, whereby he agreed to receive, keep and feed, on his farm, from December 3d, 1877, to February 20th, 1878, fourteen cattle and twenty hogs, belonging to the appellant, for the keeping and feeding of which cattle and hogs, the appellant agreed to pay the appellee at the rate of seventy-five cents for each hundred the cattle should weigh when delivered to appellee, and four cents for each pound increase of weight during said keeping and feeding, and \$3.75 for each hundred pounds increase of weight in said hogs, during said keeping and feeding, to be paid on the 20th day of February, 1878; and appellee averred the full performance of

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said contract on his part, and that, during said time, the cattle had increased in weight twelve hundred pounds, and the hogs had increased in weight one thousand five hundred and thirty pounds, and that there was due and payable to him from the appellant, on said contract, the sum of \$219.07. Wherefore, etc.

In the second paragraph of his complaint the appellee sued the appellant on an open account for \$219.07, alleging that the appellant was indebted to him in that sum for keeping and feeding the same number of cattle and the same number of hogs, during the same period of time mentioned in the first paragraph of complaint, charging therefor in the same manner and at the same rate as specified in the special contract counted upon in the first paragraph, which said indebtedness was due and payable. Wherefore, etc.

In the third paragraph of his complaint the appellee alleged, in substance, that the appellant was indebted to him in the sum of \$219.07, for feed, care and attendance before that time found, provided and bestowed, for the feeding and keeping of divers cattle and hogs of and for the appellant, at his request, a bill of particulars of which was filed with and made a part of said paragraph; which said sum of money, the appellee averred, was then due and wholly unpaid. Wherefore, etc.

The case having been put at issue was tried by a jury, and a verdict was returned for the appellee. On the trial, William D. Hays, a witness for appellee, was asked by him to state the value of corn per bushel, in the shock, during the period between the 3d day of December, 1877, and the 20th day of February, 1878, where the appellee resided. The witness said that he lived twelve miles distant from the appellee, and only knew the value in his neighborhood; that he was a farmer and cattle dealer and feeder; that he had fed and dealt in cattle for the last ten years; that he had fed cattle during winters on corn in the shock; that 1,200

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pounds was a good gain on fourteen head of cattle, weighing 15,160 pounds, fed from December 3d until the following 20th of February ; that corn-fodder in the shock was worth eight cents per shock ; that there were as many feeders in the appellee's neighborhood as in his own. The appellee then insisted that the witness should give his opinion of the value of corn, to which the appellant objected, for the reason that the question at issue was the value of corn in the shock, at appellee's farm, and it was apparent that the witness was not qualified to testify in regard thereto, and it was irrelevant and incompetent to permit the witness to testify as to the value ; but the court overruled the objection and permitted the witness to testify in regard thereto, that the value of corn in the shock, during the said period, was thirty cents per bushel ; to all of which the appellant at the time excepted, and notified the court that he would reserve the question under the code. Thereupon the court prepared a bill of exceptions for that purpose, wherein, to present the question properly to this court, the trial court stated that evidence had been given tending to show that the appellee had fed cattle for appellant during the months of December, 1877, and January and February, 1878, upon corn in the shock, and at no other place, under a contract whereby the appellant had agreed to pay the appellee seventy-five cents per 100 pounds upon the weight of cattle when furnished, and four dollars per 100 pounds for the gain, and \$3.75 per hundred pounds for the gain in weight of twenty hogs, also furnished to and fed by appellee, from the 3d day of December until the 20th of February following.

It is earnestly insisted by the appellant's learned counsel, that the evidence sought to be elicited from the witness Hays, by his answer to the question above set out, was irrelevant and incompetent ; and so, perhaps, it was as to the issues joined upon the first and second paragraphs of the complaint, by the appellant's answer in denial thereof. In

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each of those paragraphs, the appellee sought to recover of the appellant a certain sum for each one hundred pounds of gain in the weight of his cattle and hogs, during the time the appellee fed and took care of them. Upon these paragraphs, it would seem to be irrelevant and immaterial, what was the value of corn in the ear, or in the shock. The appellee sued to recover, in the first paragraph of his complaint, the contract price per 100 pounds for the increased weight of his cattle and hogs; and in the second paragraph of his complaint, he sought to recover of the appellant, for the increased weight of his cattle and hogs, such sum per 100 pounds as such increase was fairly worth. Upon either of the first and second paragraphs of the complaint, it would seem to be wholly irrelevant and immaterial as to what was the value of corn, either in the ear or in the shock.

With the third paragraph of his complaint, the appellee filed a bill of particulars containing, among others, the following items: To 988 bushels of ear corn, at 14 cents, and to 370 shocks of corn-fodder, at 6 cents. Upon this paragraph of complaint, the only issue joined was by a general denial thereof. To this issue, the evidence of the witness, Hays, complained of by the appellant's counsel, it seems to us, was relevant and competent. What weight, if any, should be given to the evidence, was a question for the jury trying the cause.

But the appellant's counsel says, that the evidence should have been excluded, upon the ground that "the bill of exceptions shows that the witness was utterly disqualified to testify on the subject." It is apparent, we think, that the appellant intended the bill of exceptions to show that the witness Hays was not qualified to testify in regard to the value of corn per bushel, in the shock, for the reason that the witness only knew the value of such corn in his own neighborhood, and resided twelve miles distant from the appellee. On this point, the inference and argument of

The State v. Gowgill.

appellant's counsel are defective and inconclusive, in this, that the bill of exceptions fails to show either that the appellee fed the appellant's cattle and hogs in the appellee's own neighborhood, or that he did not feed such cattle and hogs in the neighborhood of the witness William D. Hays. In what we have said on this point, we do not wish to be understood as even impliedly holding that the witness was rendered incompetent to testify on the subject of the question, by reason of the fact that he resided twelve miles distant from the appellee. On the contrary, we hold otherwise, and that his evidence was competent, notwithstanding the distance between his and appellee's residence.

From the record of this cause, we can not say that the trial court erred, and therefore, we are bound to say that it did not err, in the admission of the evidence of the witness Hays, for all the presumptions are in favor of the correctness of the court's ruling, and must be indulged, in the absence of any showing of positive error. *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; and *Bowen v. Pollard*, 71 Ind. 177.

The court committed no error, we think, in overruling appellant's motion for a new trial.

The judgment is affirmed, at the appellant's costs.

No. 8714.

THE STATE v. GOWGILL.

From the Wabash Circuit Court.

D. P. Baldwin, Attorney General, *M. Good*, Prosecuting Attorney, and *O. H. Bogue*, for the State.

A. Hess, for the appellee.

NIBLACK, J.—This was a prosecution against Andrew Gowgill, the appellee, for selling and giving intoxicating liquor to a minor. The indictment contained two counts.

Brown *v.* Aultman & Co.

The first charged a sale of a less quantity than a quart to one Oliver Myers, a person under the age of twenty-one years.

The second charged the appellee with having given a similar quantity of intoxicating liquor to the same person.

Upon the appellee's motion the indictment was quashed, and he was discharged. Error is assigned only upon the decision of the court quashing the indictment.

Neither count of the indictment alleged that the appellee was a person not licensed to sell intoxicating liquor in a less quantity than a quart at a time, and, as counsel inform us, it was for the want of such an allegation that the indictment was quashed. The omission of such an allegation constitutes the only objection urged in this court to the sufficiency of the indictment.

In the case of *The State v. Hamilton*, *ante*, p. 238, it was held that in a prosecution of this kind an averment that the defendant was not licensed to sell intoxicating liquor by retail was an immaterial averment; and, upon the authority of that case, the judgment in this case must be reversed. See, also, *Johnson v. The State*, 74 Ind. 197.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 7963.

BROWN *v.* AULTMAN & Co.

From the Spencer Circuit Court.

G. L. Reinhard, for appellant.

D. T. Laird, for appellee.

MORRIS, C.—The facts in this case, and the questions of law involved, are the same as in the case of *Lorch v. Aultman & Co.*, *ante*, p. 162. The conclusions reached in that case must control this.

The judgment below should be affirmed.

PER CURIAM.—It is ordered that, upon the above statement, the judgment below be affirmed.

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4. *Same.—Right of Minor Relatrix to Dismiss Proceedings.—Compromise.—Approval of Court.—Statute Construed.*—The act of March 13th, 1875, Acts 1875, Spec. Sess., p. 16, does not confer upon a minor relatrix in a bastardy proceeding the unrestricted right to compromise and dismiss the proceeding, but authorizes the court to examine into compromises made with infants, and to approve or reject them; and

a defendant in such proceeding has no right to demand that the written statement of such a relatrix, that she had compromised with him, and desired the prosecution to be dismissed, should be placed of record, without any investigation by the court. *Ib.*

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1. *Practice.—Supreme Court.—Evidence.*—A bill of exceptions which purports to contain the evidence in a cause, but concludes, "This was the evidence offered in the cause," is not sufficient. The Supreme Court can not know from the bill that the "evidence offered" was admitted and given. *American Ins. Co. v. Gallahan, 168*
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2. *Right of Mortgagee to Possession.—Answer in Abatement.*—In such case, the pendency of the action to foreclose would not deprive the mortgagee of his right to possession. The question could be raised only by an answer in abatement. *Ib.*
3. *Lien.—Appointment of Receiver.*—The appointment of a receiver does not, as a rule, affect or divest an existing lien, but is made subject to such rights and liens as had been previously acquired. *Ib.*
4. *Partnership.—Sale.*—A sale of mortgaged property by a receiver appointed in a suit between partners for a settlement of partnership business, if reported to and confirmed by the court, gives the purchaser so much interest in the property only as the firm had, and does not divest or affect the paramount mortgage lien of a stranger to the record. *Ib.*
5. *Release of Equity of Redemption.*—A mortgagor may release his equity of redemption to the mortgagee at any time after the original transaction; but such release will be closely scrutinized by the courts, and the fairness of the transaction, and the value received by the mortgagor, must be shown by clear and satisfactory evidence. *Hackleman v. Goodman*, 202
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7. He who takes a chattel mortgage impliedly assents to the temporary interruption of his possession, for the purpose of disposing of the equity of redemption. *Ib.*
8. *Evidence, Insufficiency of to Sustain Finding.*—Where a mortgagor of growing wheat, upon its ripening for harvest, was employed by the mortgagee to cut the wheat and put it in stack, and did so, but no price was fixed upon the wheat, nor allowance made for the price of his labor, and no part of the debt was extinguished, and while in the stack the wheat was levied on by the sheriff, by virtue of executions issued on judgments against the mortgagor, the evidence fails to sustain the findings that the equity of redemption had been extinguished, and that the sheriff's possession and sale were not lawful. *Ib.*

9. *Execution.—Sale of Property.*—Where mortgaged goods and chattels have been levied upon by an officer, under an execution against the mortgagor, such officer will be entitled, as against the mortgagee, to the possession of such property for the purpose of selling the same subject to the mortgage. *Emmons v. Hawon*, 358
10. *Purchase by Mortgagee at Sale Under Mortgage.—Title of Purchaser.—Levy and Sale.*—When, by the agreement of the mortgagor and mortgagee, and in accordance with the stipulations of the mortgage, the personal property therein described is sold at public auction to pay the mortgage debt, and the mortgagee, *bona fide*, becomes the purchaser thereof, he takes an absolute title thereto, freed from the lien of the mortgage; and the bare fact that, after his purchase, he left the property with the mortgagor, to be cared for by him, would not subject them to levy and sale as the property of the mortgagor. *Ib.*

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2. *Same.—Contract of Board with Member Void.—Statute Construed.*—A member of the board of health of a city, appointed under authority of section 48, is an officer within the terms of section 52 of the act of March 14th, 1867, for the incorporation of cities, 1 R. S. 1876, pp. 267, 286 and 288, and can not be interested in any contract by which any indebtedness is created against the city. *Ib.*
3. *Same.—An employment by a board of health of a city of one of its members to vaccinate pupils in a public school is a void contract, and creates no liability against the city.* *Ib.*
4. *Same.—Voluntary Services.—Quantum Meruit.*—In such case, the services rendered by a physician, who is a member of the board of health, are voluntary, and confer upon the city no value or benefit which could have been rejected, or by keeping which the city ratifies the contract or becomes liable upon a *quantum meruit*, or a *quantum valebat*. *Ib.*
5. *Agency of Public Officers.—Buying.—Hiring Himself.*—An officer of a city can not as agent contract with himself personally, buying what he is employed to sell, or hiring himself to do a service which he is employed to procure to be done. *Ib.*
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8. *Surface-Water.—Municipal Corporations.*—A municipal corporation has no right to collect surface-water in a artificial channel, and pour it in a body upon the adjacent land of another. *Ib.*
9. *Same.—Public Highways.—Embankments and Outlets.*—A city may divert surface-water from the public highways, and, to do so, may build embankments or enlarge outlets. *Ib.*

10. *Same.*—*Dominion Over Highways.*—A municipal corporation is entitled to exercise dominion over the public highways, and is not liable for so exercising this right as to change or divert the flow of surface-water. *Ib.*
11. *Same.*—*Lots Below Adjacent Streets.*—*Damages.*—If surface-water flow upon a lot because of its being below the level of adjacent streets or lots, the owner can not recover damages from the city. *Ib.*
12. *Legislative Power.*—*Ministerial Acts.*—*Negligent Performance.*—A municipal corporation is not liable for the exercise of a legislative power, but is liable for the negligent performance of ministerial acts. *Ib.*
13. *Same.*—*Collecting and Flowing of Surface-Water.*—Collecting surface-water into one channel, and causing it to flow upon another's land, is an actionable injury, being a ministerial and not a legislative or judicial act. *Ib.*
14. *Same.*—*Defect of Plan.*—For a defect in the mere plan or system of removing surface-water from a street, there is no liability so long as the ministerial work of carrying into effect the plan is not undertaken. *Ib.*
15. *Same.*—*Pleading.*—*Complaint.*—A paragraph of complaint against a city, which alleges with reasonable certainty, that the municipal authorities did, by the improvement of a street, collect in one channel the surface-water falling upon divers streets, and flow it against an insufficient culvert, and thus unlawfully cast the water in a body upon the private property of the plaintiff, contains facts sufficient to constitute a cause of action. *Ib.*
16. *Same.*—*Insufficient Evidence.*—*Practice.*—*Verdict.*—On trial of such an action, the court did right in directing a verdict for the defendant, where the evidence showed that plaintiff had suffered no material damage from overflow before the city enlarged the culverts and drains complained of; that, before such action of the city, the natural tendency of the surface-water was to flow by without damage; and that his property is at the foot of "high hills," where in times of rain the water comes down a ravine in "immense quantities." *Ib.*

COLLATERAL ATTACK.

See GRAVEL ROAD, 3; JURISDICTION, 1; MARRIED WOMAN, 3.

COMPOSITION.

See COMPOSITION BOND.

Agreement.—A composition is an agreement between a debtor and his creditor for payment of a less sum, at a time fixed, than the debt, according to its terms. *Bailey v. Boyd, 125*

COMPOSITION BOND.

1. *Surety.*—*Change of Terms.*—*Release.*—If a creditor holding a composition bond, by an agreement with the debtor, for a valuable consideration, without the knowledge or consent of the surety, materially change the terms of the contract of indebtedness, he thereby releases the surety. *Bailey v. Boyd, 125*
2. *Same.*—*Action on Composition.*—*Creditor's Election.*—If the debtor performs his part of a composition agreement, no action will lie for the original debt; if not, the creditor has his action on the original debt, and also on the composition agreement for any damages he may have sustained. He may elect to rely upon the composition agreement alone, or, if not complied with by the debtor, enforce payment of the original debt. *Ib.*

COMPROMISE.

See BASTARDY; PROMISSORY NOTE, 35.

CONSEQUENTIAL DAMAGES.
See CITIES AND TOWNS, 6.

CONSIDERATION.

See CONTRACT, 2; DECEDENTS' ESTATES, 4, 5; MARRIAGE PROMISE, 1; ORDER FOR MONEY, 1; PROMISSORY NOTE, 4, 23, 30 to 34; REPLEVIN, 11 to 13.

CONSTITUTIONAL LAW.

See CITIES AND TOWNS, 6; CRIMINAL LAW, 36, 41; PROSECUTING ATTORNEY, 1; TAXES.

CONSTRUCTION OF DEED.
See CONVEYANCE, 7.

CONTINUANCE.

See CRIMINAL LAW, 19.

CONTRACT.

See CITIES AND TOWNS, 2 to 5; COMPOSITION; COMPOSITION BOND; CRIMINAL LAW, 41; DECEDENTS' ESTATES, 3 to 5, 11, 32; DEMAND, 1; ESTOPPEL, 1; INJUNCTION, 1; MARRIAGE PROMISE, 1; MORTGAGE, 1, 2; NOTICE; ORDER FOR MONEY; PARTNERSHIP, 6; PLEADING, 3, 10; PRACTICE, 5; PROMISSORY NOTE, 20, 21, 24, 26, 27, 35; SCHOOL LAW; TOWNSHIP TRUSTEE, 3.

1. *Descriptive Words.*—*Signature.*—Descriptive words can not control, much less give validity to, a contract, and it makes no difference whether the descriptive words are simply appended to the signature at the foot of the contract, or annexed to the name in the body of the instrument. *Jackson School Tp. v. Farlow, 118*

2. *Sale and Conveyance of Real Estate — Failure of Consideration.—Rescission.—Specific Performance.—Reconveyance.—Vendor's Lien.—Complaint.—Pleading.*—A complaint in five paragraphs, alleging, in various forms, the sale and conveyance of real estate, to be paid for in notes of good and responsible men, unknown to plaintiff, and living remote from him, but represented by defendant to be ready to pay on demand, and the failure of consideration, in that the notes were worthless, praying a rescission of the contract, or specific performance, or a reconveyance, or a judgment enforcing the vendor's lien, although its language and statements be not very plain or concise, contains the substance of a cause of action, and its paragraphs are sufficient on demurrer. *Painter v. Hall, 208*

3. *Same.—Certificate of Assessment by Auditor.—Evidence.—Practice.—New Trial.*—On the trial of such action, it was error for the court to admit in evidence certified copies of the tax assessment list of the maker of each of such notes, returned under sections 127, 129 and 130, 1 R. S. 1876, pp. 104, 105. certified by the auditor of the county, merely as "a true copy of the assessment," etc., of each of the makers of the notes. *Ib.*

CONVERSION.

See PARTNERSHIP, 4.

1. *Pleading.—Complaint.—Demand.*—An averment of a demand, if otherwise necessary, is not required if a conversion is alleged in the complaint. *Knowlton v. School City of Logansport, 103*

2. *Answer of Payment to Another for Plaintiff's Use.—Cities and Towns.*—In an action by a school city against one who had been president of its board of school trustees, for conversion of money collected by him for plaintiff, an answer that he paid it over to another, who had been a trustee and treasurer of such board, but with himself legislated out of office, and who is a responsible resident of the city, and ready to account and settle with plaintiff, is insufficient on demurrer. *Ib.*

8. *Ratification of Act by Suit.—Payment to Another.—Demand.*—In an action for conversion, the plaintiff, by suing, ratifies the defendant's act in making a collection of money for plaintiff; but the ratification does not confirm his act in turning it over to another. In legal contemplation, his delivery of the money to one having no authority from the plaintiff to receive it is a conversion, and makes him liable to an action without demand. *Ib.*
4. *Same.—Recoupment.—Expenses of Collection.—Time Employed.—Ratification by Suing Limited.*—In such action, where it appears that the defendant made the collection without authority, an answer claiming for expenses of collection shows no ground for recoupment. The ratification implied by suing extends only to the act of collection, and does not embrace the time employed or expenses incurred before or after the collection. *Ib.*

CONVEYANCE.

See CONTRACT, 2; MORTGAGE, 10, 12, 13; REAL ESTATE, ACTION TO RECOVER, 10 to 14; TRUSTS AND TRUSTEE, 1 to 3; VENDOR AND PURCHASER, 7, 8.

1. *Deed.—Bond.—Dates of Two Instruments.—When Execution Presumed.—Date of Acknowledgment.*—Where a deed was dated July 20th, 1861, and a bond for reconveyance was dated July 30th, 1861, and both were acknowledged July 31st, 1861, it may fairly be assumed that the final execution of the two instruments by delivery were concurrent acts, and both consummated on the day of the date of the acknowledgments thereof. *Lentz v. Martin*, 228
2. *Real Estate.—Conveyance to Husband and Wife.—Right of Survivor.—Right of Heir.*—A conveyance of land to a woman and her husband to be held by her as her own property, the husband having the possession during his lifetime and possession to return to her if she survive him, vested in her the title in fee subject to his life-estate, if he survived. *Edwards v. Beall*, 401
3. *Same.—Deed Construed.—Joint Tenancy not Created.*—By the terms of such a deed, a joint tenancy by entireties was not vested in the husband and wife. *Ib.*
4. *Same.—Death of Wife Before Husband.—Descent of Two-Thirds to Heir.*—Upon the death of the wife before the husband, two-thirds of the estate at once descended to their son and only heir, and was not liable to be assets for the payment of the husband's debts; and the husband became seized in fee of the other one-third. *Ib.*
5. *Same.—Decree of Sale.—Confirmation.—Mistakes.—Action to Quiet Title by Heir.*—A decree of sale of such two-thirds for the payment of such debts, and a decree confirming the sale, were mistakes within the meaning of section 177, 2 R. S. 1876, p. 554, and the infant heir would be entitled to have them annulled and set aside, and his title quieted. *Ib.*
6. *Same.—Deeds of Administrator and Purchaser Annulled.—Partition.*—In such case, the deed of the administrator and the deed of the purchaser to his grantees ought also to be set aside and annulled as to such two-thirds, and partition made. *Ib.*
7. *Construction.—Deed.—Premises.—Habendum.*—In construing the terms of a deed, both the premises and the habendum must be considered. The office of the habendum is to determine what estate or interest is granted. It may often qualify the premises, but may not contradict the estate so granted. *Ib.*

COPY.

See EXHIBITS; PLEADING, 3, 9; PRACTICE, 21, 22; PROMISSORY NOTE, 7, 26.

CORPORATION.

See TOWNSHIP TRUSTEE, 3.

Right to Borrow Money.—As a general rule, a corporation, either public or private, has an implied power to borrow money for objects expressly authorized by the statute by which it was created and endowed with corporate powers and privileges, but, if such power is expressly or by implication denied by such statute, then no such power exists.

Utterback v. Terhune, 363

COSTS.

1. **Practice.**—*Appeal from Justice of the Peace.*—*Change of Venue.*—Where, in an action appealed from a justice of the peace by defendants, a change of venue from the county was granted to plaintiff, a motion by defendants to tax to the plaintiff all the costs accrued in the cause up to the time of granting the change, under the provisions of the justices' act on that subject, 2 R. S. 1876, p. 612, sec. 29, was properly overruled.
McDonough v. Kane, 181
2. **Same.**—In such case, upon the costs of the change being paid or replevied the change should be granted.
Ib.

COUNTY AUDITOR.

See CONTRACT, 3; CRIMINAL LAW, 44, 45.

COUNTY COMMISSIONERS.

See CRIMINAL LAW, 27, 44, 45; GRAVEL ROAD, 3; REPLEVIN, 4.

COUNTY TREASURER.

See CRIMINAL LAW, 44.

COVENANT.

See BANKRUPTCY; INJUNCTION, 1; PROMISSORY NOTE, 40, 42.

COVERTURE.

See HUSBAND AND WIFE, 2, 3; REAL ESTATE, ACTION TO RECOVER, 11.

CREDITS, APPLICATION OF.

See MORTGAGE, 7; PAYMENT, 2.

CRIMINAL COURT OF MARION COUNTY.

See PROSECUTING ATTORNEY, 1.

CRIMINAL LAW.

See LIQUOR LAW.

1. **Abortion.**—*Indictment.*—*Statute Construed.*—An indictment averring that the defendant unlawfully and wilfully employed and used in and upon the body and womb of a pregnant woman a certain instrument called a catheter, with intent to produce a miscarriage, it not being necessary to cause said miscarriage, to preserve the life of the woman, sufficiently charges an offence, within the meaning of section 36 of the misdemeanor act, 2 R. S. 1876, p. 471. *State v. Sherwood, 15*
2. **Disturbing Religious Meeting.**—*Affidavit.*—*Statute Construed.*—An affidavit in a prosecution for disturbing a religious meeting, under the act of March 3d, 1859, 2 R. S. 1876, p. 472, must allege, and it must be proved upon the trial, that the meeting disturbed was a collection of inhabitants of this State.
Cooper v. State, 62
3. **Same.**—*Evidence.*—*Verdict.*—Where, on the trial in such a prosecution, no evidence was offered either proving or tending to prove that the meeting was composed of inhabitants of this State, either in whole or in part, a verdict of conviction is not sustained by sufficient evidence.
Ib.
4. **Juror.**—*Reasonable Doubt.*—In a criminal cause tried by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty.
Castle v. State, 146

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5. *Same.—Instructions, General and Special.*—If, in such cause, any one of the jury, after having considered all the evidence, and after having consulted with his fellow-jurymen, entertain a reasonable doubt of the defendant's guilt, the jury can not find the defendant guilty; and it is error to refuse to thus instruct the jury, notwithstanding the general charge of the court given to the jury, that they must be satisfied beyond a reasonable doubt of the guilt of the defendant. *Ib.*
6. *Same.—Individual Responsibility of Juror.*—Each juror should feel the responsibility resting upon him as a member of the jury, and should realize that his own mind must be convinced of the defendant's guilt beyond a reasonable doubt before he consents to a verdict of guilty. *Ib.*
7. *Indictment.—Malice.—Assault and Battery with Intent to Murder.*—Where, in an indictment for an assault and battery with intent to commit murder, there is a defect in the spelling and in the construction of the word formed by the letters and characters probably intended for the word "malice," and it is evident that such word represents and stands for the word "malice," wherever it occurs in the indictment, it ought to be so read and construed. *Pierce v. State, 199*
8. *Same.—Voluntary Manslaughter.*—Where such offence is not charged to have been committed with malice, the indictment may still be sufficient, on motion to quash, as a charge for an assault and battery with intent to commit voluntary manslaughter. *Ib.*
9. *Same.—Verdict.—Judgment.*—Where, upon the trial of such indictment, the defendant was found "guilty as charged in the indictment," the indictment is sufficient to sustain both the verdict and judgment, whether considered as charging an intent to commit murder, or only an intent to commit voluntary manslaughter. *Ib.*
10. *Practice.—Bill of Exceptions.—Supreme Court.*—Where a bill of exceptions containing the evidence is not filed within the time given therefor by the trial court, it is not properly in the record, and will not be considered by the Supreme Court. *Ib.*
11. *Murder.—Evidence.—Declarations.—Remonstrances with Deceased.—Threats.*—On the trial of an indictment for murder, the court did not err in refusing to admit in evidence statements of the deceased to witnesses, in response to their remonstrances with him for visiting the defendant's wife. Such statements do not fall within the rule making previous threats of the deceased, although uncommunicated, competent evidence for the accused. *Combs v. State, 215*
12. *Same.—Wife's Confession of Adultery with Deceased, by his Coercion.—Uncommunicated Reports and Rumors.*—On such trial, the court did not err in refusing to permit the accused to prove by his wife that the deceased had coerced her into an act of adultery, and that, on the night before the killing of the deceased, she had told her husband that all the reports and rumors he had heard were true, there being no offer to prove what reports or rumors he had heard, or that the act of adultery had ever come to his knowledge. *Ib.*
13. *Same.—Practice.—Argument.—Discretion of Trial Court.—Employment of Counsel by Defendant's Wife.—Witness.*—On such trial, the court did not err in refusing to exercise its discretion and restrain the State's counsel from commenting upon an alleged employment of counsel by the wife—who was a witness—of the accused, the night before the homicide. *Ib.*
14. *Same.—Immaterial Statement in Argument.*—On such trial, the statement by an attorney for the State, that "Three or four men have been recently executed at Indianapolis, most of whom set up the plea of insanity," was not of sufficient materiality to warrant a reversal of the judgment of conviction. *Ib.*
15. *Same.—Conduct of Argument.—Abuse of Discretion.*—The conduct of

the argument is a matter much within the discretion of the trial court, and it is only where there is an abuse of such discretion that appellate courts will interfere. *Ib.*

16. *Grand Jury.—Challenge to Array.*—A challenge to the array of a grand jury must be supported by affidavit, setting forth the causes therefor. *McClary v. State, 260*
17. *Same.—Plea in Abatement.*—A plea in abatement, seeking to attack the manner in which a grand jury was organized, must show not only that the question presented by it was not raised by a challenge to the array, but also that the defendant had no suitable opportunity of challenging the array. *Ib.*
18. *Same.—*Where a defendant has challenged the array of a grand jury, alleging certain facts in support thereof, he can not afterward plead the same facts in abatement. *Ib.*
19. *Practice.—Continuance.—Illness of Attorney.*—The propriety of a postponement of a trial on account of the illness of one of the attorneys of a party is largely in the discretion of the trial court, and unless there has been an abuse of that discretion, no error is committed in refusing a postponement. *Ib.*
20. *Same.—Questions to Witness.—New Trial.*—The mere asking of improper questions of a defendant, who was a witness in his own behalf, does not afford a sufficient reason for a new trial. *Ib.*
21. *Same.—Juror Asleep During Argument.*—The mere falling asleep, for a short time, by a juror, during the argument of counsel for the defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial. *Ib.*
22. *Same.—Sending Jury Out to Deliberate upon Verdict.*—Sending out a jury at ten o'clock at night to deliberate upon their verdict, is a matter within the discretion of the court, and no available error is committed thereby unless there is shown to have been an abuse of that discretion. *Ib.*
23. *Same.—Surprise.*—The failure of counsel for the State to produce at the trial the knife with which the prosecuting witness was wounded, and "false testimony given upon the trial concerning the length and character of such knife," do not constitute such surprise as would authorize the granting of a new trial. *Ib.*
24. *Same.—Misconduct of Jury.—Bailiff in Jury Room During Deliberations.—Insufficiency of Affidavit.*—An affidavit, filed in support of a motion for a new trial on account of the misconduct of the jury, in permitting their bailiff to be present during their deliberations, which states "that the bailiff told the affiant that he was in the jury room the greater portion of the time while the jury were in consultation," is insufficient to prove that the bailiff was in the room as alleged. *Ib.*
25. *Same.—Instructions.—Practice.*—Where the court sufficiently instructs the jury as to what was necessary to make out the crime charged, but was not asked to, and did not, instruct the jury as to the lesser offences of which the defendant might be convicted, no error is committed of which the defendant has reason to complain. *Ib.*
26. *Indictment.—Name.—Presumption.—Affidavit and Information.*—The law presumes every man to have a christian name, unless the contrary appears, and, in an indictment or information against him, that name, as well as his surname, must be stated in full, unless some reason is shown for not so stating it; and a failure to state it, or a reason for not stating it, may be taken advantage of on motion to quash; but the court, on motion to quash or in arrest of judgment in a prosecution of a defendant under the name of "Ben," will presume that it was his true and full christian name. *Burton v. State, 478*

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27. *Discretion of Court to Appoint Attorney for Poor Person.—County Commissioners.*—A person prosecuted for crime, and unable to employ counsel for his defence, is not entitled to have such counsel assigned him as he may choose, and the court in its discretion may decline to assign him the counsel he may desire, and assign him other counsel, and its action therein can not be error, unless there is, in the particular circumstances, an abuse of discretion; and where county commissioners have employed attorneys to defend poor persons charged with crime, though it may be they have no such authority, yet that is no reason why the court may not appoint an attorney thus employed. *Ib.*
28. *Practice.—Exceptions.—Bill of Exceptions.—Statute Construed.*—A bill of exceptions, by section 120 of the code, as amended by the act of March 2d, 1877, Acts 1877, p. 100, must be presented and filed either during the trial or within such time as the court may allow, not exceeding sixty days from the day judgment is entered. Exceptions, however, must be taken during the trial, but time may be allowed within the sixty days for embodying them in a proper bill. *Colce v. State, 511 Ib.*
29. *Witness.—Opinion.—Non-Expert.—Unsoundness of Mind.—Evidence.*—In criminal prosecutions a non-expert witness must always state the facts upon which he bases his opinion as to the mental capacity of the defendant, and it must also appear that he has some knowledge of the acts and conduct of the defendant, to entitle his opinion to be admitted as evidence. *Ib.*
30. *Same.—Duty of Court.—Jury.*—In such case, it is the duty of the court to decide whether such knowledge is shown, and such facts stated, as will entitle the witness to express an opinion, but what weight the opinion shall have is a question of fact for the jury. *Ib.*
31. *Same.—Right of Court to Question Witness.*—A court has the right to question a witness, and no error is committed thereby unless the questions are in themselves objectionable, or are so asked as to improperly influence the jury. *Ib.*
32. *Drunkenness.—Incest.*—Voluntary drunkenness can neither excuse nor palliate the crime of incest. *Ib.*
33. *Same.—Instruction.*—Upon trial of a defendant charged with incest, it is not error for the court to state to the jury that a man with ordinary capacity and will power, unimpaired by disease, is bound to restrain his lustful passions. *Ib.*
34. *Same.—Indictment.—Instruction.—Evidence.—Jury.*—Where, in such action, the indictment charged the offence to have been committed at a specified date, but all the evidence, as well for the State as for the defendant, was directed to another and later date, reference in an instruction to the mental condition of the defendant, whose defence was unsoundness of mind, at the date named in the indictment, would not likely mislead the jury. *Ib.*
35. *Same.—“Reasonable Doubt.”*—An omission by the trial court, in its instructions, to define the term “reasonable doubt,” unless asked to do so by the defendant, will not entitle him to a reversal of the judgment. *Ib.*
36. *Constitutional Law.—Fines and Forfeitures.—Judgments Replevied Before April 15th, 1881.—Imprisonment.—Habeas Corpus.—Statute Construed.*—The act of April 15th, 1881, Acts 1881, p. 560, providing for the collection of judgments for fines and forfeitures, by the issuance of an execution, and the imprisonment of the defendant upon the expiration of the stay secured to him by the entry of replevin bail, so far as it relates to judgments replevied before that date, is unconstitutional, and a writ of *habeas corpus* will lie to release a defendant so imprisoned. *Dinckerlocker v. Marsh, 548*

37. *Same.—Reply to Return.—Demurrer.—Departure.*—A reply to the return to such writ, alleging the issue and levy of an execution on real estate of the replevin bail, the sheriff's neglect to return the same, that such bail, for six months after becoming so, and for sixty days after the issue of such execution, was the owner of other property, real and personal, to the value of more than one thousand dollars, on which the judgment is a lien, is a departure from the petition, and insufficient on demurrer. *Ib.*
38. *Jeopardy.*—Providing for the enforcement of an existing judgment is not creating a second jeopardy, in violation of section 14 of the Bill of Rights, 1 R. S. 1876, p. 23. *Ib.*
39. *Punishment Increased.*—A punishment may be lessened, but not increased, by a statute enacted after the commission of an offence. *Ib.*
40. *Payment.—Replevin Bail.—Statute Construed.*—Under the criminal code of 1852, 2 R. S. 1876, p. 407, the entry of replevin bail, as well as payment, terminated the power to imprison under a judgment of conviction. *Ib.*
41. *Ex Post Facto Law.—Contracts.—Replevin Bail.—Bill of Rights.*—The 1st and 2d sections of the act of April 15th, 1881, Acts 1881, p. 560, do not conflict with section 14, but conflict with section 24 of the Bill of Rights, and are void so far as they attempt to restore a right to imprison in cases where that right had terminated by the entry of replevin bail. *Ib.*
42. *Query.*—What effect has the statute on judgments rendered before, but replevied after, that date? *Ib.*
43. *False Pretences.—Indictment.*—An indictment, charging the obtaining of property under false pretences, must specify the pretences, the goods obtained, and from whom, negative the pretences, aver that the defendant knew them to be false, and show the connection between them and the fraud accomplished by their means. *Johnson v. State, 553*
44. *Same.—Claim Against County.—Allowance by Board of Commissioners.—Warrant and Order to Auditor.—Payment by Treasurer.*—Counts of an indictment, charging false pretences in obtaining payment of a claim against a county, which fail to accurately describe the pretences, the order or warrant issued to the defendant, to whom it was payable, for what amount it was drawn, and the connection between the false pretences relied on by the board of commissioners in allowing the claim, and the act of the treasurer in paying the amount allowed, are insufficient on motion to quash. *Ib.*
45. *Same.—Warrant and Order of Board to Auditor of County for Payment of Money.*—A warrant and order of the board of commissioners, upon the auditor of the county, for the payment of money, is an instrument unauthorized by law. *Ib.*
46. *Keeping House for Gaming.—“A House” Equivalent to “His House.”—Indictment.*—It is not a valid objection to an indictment for keeping a house for gaming, etc., under the first clause of section 29, 2 R. S. 1876, p. 489, that the defendant is charged with keeping, not his house, but a house. *Hamilton v. State, 586*
47. *Same.—“Hire of Table” Thing of Value.—Statute Construed.*—Suffering gaming for “the hire of the table” is within the purview of section 29 of the statute, *supra*, and constitutes a public offence. “The hire of a table” is a thing of value, to be risked on a game of chance. *WORDEN, J., dissents.* *Ib.*
48. *Same.—Evidence.—Defendant’s Knowledge.*—On trial of an indictment for keeping a house for gaming, evidence that, although the defendant’s saloon, bar and tables were in charge of his clerk or bartender,

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he was frequently present, inattentive, sitting behind the stove in a remote part of the saloon, reading newspapers, and that his tables had been so used for gaming, two years, justified the jury's inference that he knew how the business of his saloon was being conducted, and a finding that he suffered the same to be used as charged. *Ib.*

49. *Same.—Instruction.—Money or Other Things of Value.—Chips and Checks.*—An instruction, which correctly defined a wager of the money-rent of the table as gaming, was not erroneous because it added, "or * * for a wager of chips, checks, or other things of value;" but the question of the value of the chips and checks was thereby left to the jury. *Ib.*

CROSS COMPLAINT.

See PLEADING, 12; PRACTICE, 23, 42, 43; PROMISSORY NOTE, 15.

DAMAGES.

See CITIES AND TOWNS, 6, 11, 13 to 16; INJUNCTION, 1; MORTGAGE, 6; PRACTICE, 18; PROMISSORY NOTE, 19; REPLEVIN, 1, 7; REPLEVIN BAIL, 2; SUPREME COURT, 6, 15; TRESPASS, 2 to 4; TRUST AND TRUSTEE, 8.

DECEDENTS' ESTATES.

See CONVEYANCE, 4 to 6.

1. *Will.—Executor.—Suit on Bond for Failure to Pay Legacy.*—The proper person to pay a legacy is the executor, or the administrator with the will annexed, and for a failure to pay it he may be sued on his bond. A suit for such failure may be maintained without any previous order of court that the legacy be paid, and without the previous removal of the officer. *Gould v. Steyer*, 50
2. *Pleading.—Complaint.—Necessary Averments.*—A complaint by a legatee against residuary legatees, to recover a legacy, which avers neither that the estate of the testator has been finally settled, nor that the executor or the administrator with the will annexed has been discharged, fails to show a cause of action, upon the demurrer of plaintiff to an answer thereto. *Ib.*
3. *Contract.—Administrator.—Pleading.—Demurrer.*—Where a complaint alleges that an administrator contracted in his individual capacity, it will be held, upon demurrer, that the contract binds him individually, although it appears that the subject-matter of the contract grew out of matters connected with the estate represented by him. *Holderbaugh v. Turpin*, 84
4. *Same.—Consideration Accruing After Death of Intestate.*—Where an administrator enters into a contract upon a consideration accruing subsequent to the death of his intestate, it is deemed his individual contract. *Ib.*
5. *Same.—Statute of Frauds.*—A contract by an administrator, founded upon a consideration accruing after the death of his intestate, is not within the statute of frauds, although it may relate to, and be connected with, matters growing out of the administration of the estate. *Ib.*
6. *Action for Money Loaned.—Exclusion of Evidence.—Witness.*—On the trial of an action by an administratrix, for money loaned by her intestate, the court erred in refusing to permit the defendant to prove by a competent witness, that the money claimed to have been a loan to him was, in fact, drawn by him from a bank on a check of the intestate, in his lifetime, and at his request paid to the witness, with other money advanced, in discharge of a note of the intestate held by him. *Slade v. Leonard*, 172
7. *Same.—*The fact that the complaint alleged a promise to pay the sum to plaintiff after the death of her intestate did not render the proffered evidence inadmissible. *Ib.*

8. *Same.—Declarations of Intestate.*—On such trial, it was error for the court to refuse to permit the defendant to prove by competent witnesses declarations and admissions of the intestate as to the amount due him from the defendant. *Ib.*
9. *Same.*—The declarations of an intestate are admissible against an administrator, or any others claiming in his right. *Ib.*
10. *Same.—Account Book of Intestate Used in Settlement with Defendant.*—On such trial, the defendant was entitled to such evidence as the account book of plaintiff's intestate might furnish touching the alleged indebtedness, and it was proper for the court to permit questions to be put to the plaintiff as a witness, directed to an identification of it and the book of defendant, as the books used in making an alleged settlement; but the rejection of the proposed testimony was not an error injurious to defendant, the jury having found a verdict on an item not included therein. *Ib.*
11. *Promissory Note.—Contract.—Parol Agreement.—Executed Gift.—Practice.—Demurrer.—Legal Conclusion.—Right of Administrator to Sue.*—In an action by an administrator upon a note executed to his decedent, the defendant answered that the note was executed by him to his father, the decedent, for the purchase of his real estate, with the agreement that only the interest and such parts of the principal as should become necessary should be paid to the defendant's father and mother during their lives, and that after the death of both he should pay the note to his sisters, or their children; that his mother is living, and entitled to receive the interest on the note.
Held, that, as the note was absolute and unconditional in its terms, it could not be varied or contradicted by proof of contemporaneous verbal agreements.
Held, also, that the note did not constitute an executed gift in favor of the daughters, to whom it is alleged it was agreed to be paid.
Held, also, that so long as the note remained in the hands of the deceased, to whom it was payable, it was absolutely his property, and, so remaining until his death, went to his administrator to be collected as part of the assets of the estate.
Held, also, that the allegation, that the widow had a right to the possession of the note, is not an averment of fact which the demurrer admits, but is a statement of a legal conclusion.
Held, also, that the administrator alone was entitled to hold and enforce the contract according to its terms. *Foglesong v. Wickard*, 258
12. *Fraudulent Mortgage.—Action to Set Aside.*—The administrator of a decedent's estate can maintain an action to set aside a mortgage of personal property, and an assignment of a certificate of purchase of real estate, fraudulently obtained from the decedent, when such property is needed for the payment of debts. *Martin v. Bolton*, 295
13. *Same.—Pleading.—Complaint.—Repayment.*—Where, in such action, the complaint does not show that any consideration was paid to the decedent for the mortgage or assignment, an averment of repayment is not necessary to the sufficiency of the complaint. *Ib.*
14. *Principal and Surety.—Replevin Bail.—Judgment.*—Where one becomes replevin bail upon a judgment rendered against the principal debtors, and against the estate of a deceased surety as such, at the request of the principal debtors, he must look to them alone for reimbursement for the payment of the judgment, and can not enforce a claim for payment against the estate of the surety. *Taylor v. Russell*, 386
15. *Same.—Judgment Against Administrator not Repleviable.*—Such judgment against an administrator is not repleviable, and the result of the entry of replevin bail is the same as if objection had been made under section 430, 2 R. S. 1877, p. 205. *Ib.*

16. *Query.*—Should not such a claim be filed within one year from the date of the first appointment of an executor or administrator, and notice thereof? *Ib.*
17. *Contest of Will.—Special and General Administrators.—Appeal.*—After a judgment against the validity of a will, in an action to resist the probate thereof, during the pendency of which action a special administrator was appointed for the decedent's estate, it is proper for the court to appoint a general administrator, although an appeal may have been taken from such judgment. *Hayes v. Hayes*, 395
18. *Same.—Right of Court to Install Executor.*—In such case the court, by the appointment of a general administrator did not deprive itself of the power to install the rightful executor of the will in office should a judgment of reversal result in a final adjudication declaring the will valid and effectual. *Ib.*
19. *Special and General Administrators.*—Special administrators are appointed for temporary purposes, and not as permanent representatives of the decedent's estate, and when the condition of affairs which made the appointment of a special administrator necessary has ceased to exist, then the special letters may be supplanted by general letters of administration. *Ib.*
20. *Right of Next of Kin to Letters of Administration.*—Section 7 of the act for the settlement of decedents' estates, 2 R. S. 1876, p. 402, is mandatory, and where a son of a decedent, eligible and qualified, asks to be appointed administrator of the estate, it is error for the court to refuse the request and confer the trust upon a stranger. *Ib.*
21. *Executor or Administrator.—Right to Sue.*—Generally, the executor or administrator of a decedent alone can maintain an action for the recovery of a debt due or owing to such decedent at the time of his death. *Begien v. Freeman*, 398
22. *Intestate.—No Debts and no Administration.—Heirs May Sue.*—Heirs at law of an intestate may sue where such decedent left no debts to be paid, and there was no administration. *Ib.*
23. *Same.—Widow as Sole Heir.—Promissory Note Acquired by Descent.*—An intestate's widow, being his sole heir, may sue upon a promissory note payable to him, which came to her by descent. *Ib.*
24. *Action on Administrator's Bond to Recover Unpaid Judgment.*—An action may be maintained on an administrator's bond to recover the amount of a judgment against the estate of his intestate, the estate being solvent, the judgment the only unpaid claim, and the administrator always having money in his hands to pay it. *Pence v. Makepeace*, 480
25. *Same.—Answer.—Set-Off.—Note of Plaintiff.*—In such case, an answer that the judgment plaintiff owes on a note to the intestate a larger amount, upon which he refuses to credit the amount of his judgment, is insufficient as an answer of set-off, or for any other purpose. *Ib.*
26. *Same.—Answer of Uncollected Claims.*—In such case, an answer, that the estate is unsettled, has a large amount of claims uncollected, is solvent, and will be able to pay all claims against it, when the assets are fully realized upon, contains no defence. *Ib.*
27. *Same.—Evidence.—Order Book.—Admissions of Administrator.*—On trial of such action, the plaintiff's judgment may be read in evidence from the order book, and where, besides it, there was the parol admission of the administrator, that "there is enough money in my hands to pay this claim, independent of all other claims," the evidence fully sustained the finding for the plaintiff, and the finding was not contrary to law. *Ib.*
28. *Demand.—Pleading.—Complaint.—Duty of Administrator to Pay Judg-*

ment.—The order in a judgment allowing a claim against a decedent's estate is sufficient to make it the duty of the administrator to pay it without a specific demand, if he has money in his hands, and no demand is necessary before bringing a suit on his bond to recover the amount. *Ib.*

29. *Will.*—*Legacy.*—*Direction to Invest.*—*Bank Stock.*—A direction in a will that a legacy be put at interest must be strictly followed; and, in such case, bank stock is not a proper investment. *Gilbert v. Welsch*, 557
30. *Same.*—*Final Report.*—*Legatee's Exceptions.*—*Evidence.*—*Unsupported Finding.*—Upon exceptions by a legatee to a final settlement report of an administrator with the will annexed, evidence that, without an order of court, and without the knowledge of the legatee, he invested the legacy in bank stock, in his own name, which depreciated in value, causing a loss of a portion of the trust fund, and that he had paid the legatee the part only which remained after deducting the loss, was insufficient to justify a finding and judgment confirming his report, and discharging him from his trust as to legatee. *Ib.*
31. *Same.*—*Administrator's Profit and Loss.*—In such case, the administrator, having had opportunity of profit in the rise in value of the bank stock, can not cast the loss upon the trust estate, but must suffer it himself. *Ib.*
32. *Same.*—*Settlement.*—*Contract.*—*Performance.*—In such case, where the evidence shows that the parties made, and in part executed, a settlement on an agreed basis, the legatee has a right to enforce full performance. *Ib.*

DECLARATIONS.

See CRIMINAL LAW, 11; DECEDENTS' ESTATES, 8, 9; EVIDENCE, 9.

DECREE.

See BILL OF EXCEPTIONS, 2; CONVEYANCE, 5.

DEDICATION.

See HIGHWAY, 1; TRESPASS, 5.

DEED.

See CONVEYANCE; MORTGAGE, 5, 10 to 13; REAL ESTATE, ACTION TO RECOVER, 10 to 14.

DEFAULT.

See PRACTICE, 11, 16 to 18, 35, 43, 45; SUPREME COURT, 6, 7.

DEFECTS CURED.

See MARRIAGE PROMISE, 1; PARTITION, 7; PLEADING, 13.

DELIVERY.

See CONVERSION, 3.

DEMAND.

See CONVERSION, 1, 3; DECEDENTS' ESTATES, 28; EXECUTION, 2; GUARDIAN AND WARD, 2; ORDER FOR MONEY, 3; PROMISSORY NOTE, 3.

1. *Breach of Contract.*—No demand is necessary where there is a complete breach of a promise to pay money, for the defendant is in default without a request. *Holderbaugh v. Turpin*, 84
2. Where one is indebted for goods sold to his order, no demand of payment is necessary on the part of the creditor. *Rend v. Boord*, 307

DEMURRER.

See PRACTICE, 6, 19, 24, 32, 39, 46; PROMISSORY NOTE, 15; PROSECUTING ATTORNEY, 4; REAL ESTATE, ACTION TO RECOVER, 5; SLANDER, 2; SUPREME COURT, 9, 16, 22; TAXES; VENDOR AND PURCHASER, 5.

DEMURRER TO EVIDENCE.

See PRACTICE, 31, 37; PROMISSORY NOTE, 20.

DEPARTURE.

See CRIMINAL LAW, 37; PLEADING, 7; TRESPASS, 1.

DESCENT.

See CONVEYANCE, 4; DECEDENTS' ESTATES, 23; MORTGAGE, 10, 11; PARTITION, 5.

DESCRIPTIO PERSONÆ.

See CONTRACT, 1; SCHOOL LAW, 4.

DESCRIPTION OF LAND.

See MORTGAGE, 8; PARTITION, 10, 11; VENDOR AND PURCHASER, 7 to 12.

DILIGENCE.

See JUDGMENT, 3.

DISCLAIMER.

See REAL ESTATE, ACTION TO RECOVER, 1.

DISCRETION,

See CRIMINAL LAW, 13 to 15, 19, 22, 27.

DISMISSAL.

See APPEAL, 1; BASTARDY, 2, 4; CHATTEL MORTGAGE.

DISTURBING RELIGIOUS MEETING.

See CRIMINAL LAW, 2.

DIVORCE.

See PARENT AND CHILD.

DRUNKENNESS.

See CRIMINAL LAW, 32.

ELECTION TO SUE.

See COMPOSITION BOND, 2.

ENDORSER—ENDORSEE.

See PROMISSORY NOTE, 13, 14.

EQUITY OF REDEMPTION.

See CHATTEL MORTGAGE, 5 to 8.

ESTOPPEL.

See HIGHWAY, 2; REAL ESTATE, ACTION TO RECOVER, 11; SCHOOL LAW, 4.

1. *Estoppel in Puis.*—*Contract.*—As a rule, there can be no estoppel by conduct, short of a binding contract, where the facts out of which the estoppel is claimed to arise are known to all the parties.

Stoddard v. Johnson, 20

2. *Presence of Agent at Receiver's Sale.*—The fact that an agent of the mortgagee of personal property was present at a receiver's sale of such mortgaged property and stood by and witnessed the sale without disclosing the mortgagee's title, and without objection, the record showing that the mortgagee was not a party to the proceeding and had a paramount title, and not showing that any agent authorized to waive or sacrifice his rights was present at the sale, does not estop the mortgagee to object to such sale. *Lorch v. Aultman & Co., 162*

EVIDENCE.

See BASTARDY, 1; BILL OF EXCEPTIONS, 1, 2; CHATTEL MORTGAGE, 8; CITIES AND TOWNS, 16; CONTRACT, 3; CRIMINAL LAW, 3 to 5, 10 to 12, 29, 34, 48; DECEDENTS' ESTATES, 6 to 10, 27, 30; GUARDIAN AND WARD, 3; INSURANCE, 2, 3; MARRIAGE PROMISE, 2; MORTGAGE, 1;

NEGLIGENCE, 3; NEW TRIAL; PARENT AND CHILD; PARTITION, 7; PARTNERSHIP, 3, 4; PRACTICE, 1, 9, 10, 13, 15, 31, 33; PROMISSORY NOTE, 2, 16, 18 to 21, 30 to 34, 45; RAILROAD, 2; REAL ESTATE, ACTION TO RECOVER, 2 to 4; REPLEVIN, 2, 8 to 10, 17; SLANDER, 5, 6; SPECIAL VERDICT, 2; SUPREME COURT, 1, 2, 4, 8, 9, 16; TAX TITLE, 3, 6, 7; TRESPASS, 5.

1. *Parol Evidence Varying Written Agreement.—Partnership.*—Parol evidence is not admissible to vary a written partnership agreement, by showing that a party's interest in the capital stock is greater than that stated therein. *Wood v. Deutchman, 148*
2. *Assessment Lists.—Officer.*—Assessment lists, made out and arranged under the direction of a public officer, in pursuance of a duty enjoined by law, are competent evidence as tending to show the amount of property owned by the assessed. *Painter v. Hall, 208*
3. *Same.—How Certified.*—To render a copy of a tax assessment list, returned under sections 127, 129 and 130, competent and admissible as legal evidence, under section 283, 2 R. S. 1876, p. 150, it must be certified by the auditor, as keeper of said instrument, to be "a true and complete copy" thereof. *Ib.*
4. *Documentary Evidence.—Authentication.—Requirement of Statute.*—Where a statute prescribes the mode of authentication of records, instruments, etc., no other mode will do. *Ib.*
5. *Title Bond Acknowledged and Recorded.*—A title bond duly acknowledged before the recorder, and recorded, was properly admitted to record, and the record of the bond was competent evidence to prove its contents. *Lentz v. Martin, 228*
6. *Value of Services of Physician in Post Mortem Examinations.*—In an action by a physician against a board of county commissioners, for services rendered in conducting *post mortem* examinations under employment by the coroner, it is wholly immaterial, in determining the value of the services, what is or has been the average daily income of such physician from his profession. *Board, etc., v. Chambers, 409*
7. *Same.—Expert Testimony.*—Where, in such action, witnesses testified as experts as to the value of such services, but stated they had no knowledge as to what other physicians had charged for such work, but based their opinion on what they thought the services were worth, such evidence is competent to go to the jury. *Ib.*
8. *Same.*—Evidence as to what price the board of commissioners could have procured the services of other physicians to do such work is incompetent. *Ib.*
9. *Declarations.*—Declarations of a party are provable against but not for him. *Schenck v. Sithoff, 485*
10. *Competency of Testimony of Witness as to Value.*—On trial of an action for money due and unpaid, for feeding cattle and hogs from December 3d, 1877, to February 20th, 1878, testimony of a witness living twelve miles distant, as to the value of the corn and fodder, so fed, in the shock during December, 1877, and January and February, 1878, in his neighborhood, was competent and relevant in support of a paragraph of the complaint, accompanied by a bill of particulars containing items of the number of bushels of ear corn and of shocks of corn-fodder so fed and price of each, upon which paragraph issue was joined by general denial only. *Foster v. Ward, 594*
11. *Same.—Neighborhood.—Inference.*—In such case, notwithstanding the distance between the residence of the witness and that of the plaintiff, his evidence was competent, its weight being a question for the jury. There is no inference that the hogs were not fed "in his neighborhood." *Ib.*

EXCEPTIONS.

See CRIMINAL LAW, 28; PRACTICE, 4, 18, 29; SUPREME COURT, 16.

EXCHANGE.

See PAYMENT, 1; PLEADING, 5, 6.

EXECUTION.

See ATTACHMENT, 1; CHATTEL MORTGAGE, 6 to 9; CRIMINAL LAW, 37; PARTNERSHIP, 3; PROMISSORY NOTE, 13, 14; REAL ESTATE, ACTION TO RECOVER, 6, 7; REPLEVIN, 6, 15; SHERIFF'S SALE.

1. *When Justifies Levy.*—*Sheriff.*—An execution, in all respects regular, addressed to a sheriff, reciting a judgment recovered in a court of record having jurisdiction, justifies the sheriff in seizing the property of the judgment debtor subject to execution, for the purpose of satisfying the judgment and costs. *Gall v. Fryberger*, 98
2. *Same.*—*Replevin.*—*Married Woman.*—It is lawful for a sheriff to levy upon the personal property of a married woman by virtue of an execution, in all respects regular, issued upon a personal judgment rendered against her; and in an action by her against the sheriff, to replevy property so levied, where no demand is alleged or proved, and in the absence of any showing that the property was unlawfully detained by him, she can not recover. *Ib.*
3. *Proceedings Supplementary.*—*Affidavits.*—*Practice.*—Where proceedings supplementary to execution are instituted by filing two separate affidavits stating causes therefor, and each closing with a separate prayer for relief, their sufficiency should be considered separately. *Abell v. Riddle*, 345
4. *Same.*—*Exemption.*—In proceedings supplementary to execution under section 522 of the code, 2 R. S. 1876, p. 231, the affidavit must show that the property which it is sought to reach, together with the other property claimed by the judgment debtor as exempt from execution, exceeds the amount exempt by law, and an averment that the property "is not exempt from execution," is insufficient, and is not aided by the averment that the debtor is a single and unmarried man, for whether single or unmarried, if a resident householder, he is entitled to the exemption. *Ib.*

EXECUTOR.

See DECEDENTS' ESTATES, 1, 18, 21.

EXEMPLARY DAMAGES.

See TRESPASS, 2 to 4.

EXEMPTION.

See EXECUTION, 4; PROMISSORY NOTE, 13; REAL ESTATE, ACTION TO RECOVER, 6, 7; TAXES.

EXHIBITS.

See PLEADING, 3; PRACTICE, 21, 22, 37.

1. *Pleading.*—*Complaint for Injunction.*—*Copies of Proceedings and Judgments.*—Copies of the proceedings and judgments of a justice of the peace, filed with a complaint for injunction against their enforcement upon execution issued from the circuit court, do not constitute such exhibits as to become parts of the complaint. *Matheney v. Earl*, 531
2. *Practice.*—*Pleading.*—Exhibits filed with a pleading, which are not the basis thereof, constitute no part of the pleading, and can not add to, or detract from, the force of its averments. *Stotsenburg v. Same*, 538

EXPERT TESTIMONY.

See EVIDENCE, 7.

EX POST FACTO LAW.
See CRIMINAL LAW, 38 to 42.

EXTENSION OF TIME.
See PROMISSORY NOTE, 16, 18, 20, 23, 38, 39, 44.

FALSE PRETENCES.
See CRIMINAL LAW, 43.

FENCE.
See RAILROAD, 2; REPLEVIN, 1 to 5.

FINDING.
See CHATTEL MORTGAGE, 8; DECEDENTS' ESTATES, 27, 30; PARTITION, 6, 7; PRACTICE, 11, 40; SPECIAL VERDICT, 2; SUPREME COURT, 26, 27.

FINES AND FORFEITURES.
See CRIMINAL LAW, 36.

FIRE INSURANCE.
See INSURANCE, 4, 5.

FORCIBLE ENTRY AND DETAINER.
See INJUNCTION, 4.

FOREIGN INSURANCE COMPANY.
See INSURANCE, 3.

FORMER ADJUDICATION.
See HUSBAND AND WIFE, 3; TAX TITLE, 1, 2.

FRAUD.
See DECEDENTS' ESTATES, 12; MORTGAGE, 3, 4; REPLEVIN, 6; VENDOR AND PURCHASER, 1 to 4.

GAMING.
See CRIMINAL LAW, 46 to 49.

GARNISHMENT.
See JUDGMENT, 5, 6.

GIFT.
See DECEDENTS' ESTATES, 11; REPLEVIN, 11.

GOOD FAITH PURCHASER.
See TRUSTS AND TRUSTEE, 5; VENDOR AND PURCHASER, 9.

GOOD-WILL.
See INJUNCTION.

GRAND JURY.
See CRIMINAL LAW, 16 to 18.

GRAVEL ROAD.

1. *Assessments.—Injunction.—Statute Construed.*—Section 12 of the act of March 3d, 1877, in relation to the construction of gravel roads, Acts 1877, Reg. Sess., p. 82, confers authority upon the circuit court to enjoin or declare void an assessment ordered by the county commissioners, only in actions brought by a single individual or by individuals having a single interest, for the purpose of enjoining or declaring void the assessment made against his or their land, and wherein a judgment could be rendered without affecting the rights or liabilities of other parties in interest, and does not apply to an action by numerous parties, in which it is sought to enjoin the collection of assessments made upon their lands for the construction of a gravel road. *Stoddard v. Johnson, 20*
2. *Same.—Error in Proceedings.—Intention of Legislature.*—Under the provisions of said section, it was intended by the Legislature that

errors and defects in the proceedings, which did not directly and injuriously affect the rights of the complainant, should not be deemed cause for assailing such proceedings. *Ib.*

3. *Free Gravel Road.—Construction of.—County Commissioners.—Finding of Jurisdictional Facts.—Presumptions.—Record.—Judgment.—Collateral Attack.*—The filing or presentation of a petition to the board of county commissioners for the construction of a free gravel road, under the act of March 3d, 1877, *supra*, calls into exercise the jurisdiction of such board, and authorizes it to determine, not only whether the petition is properly signed by the requisite number of land-owners, but every other fact necessary to the granting of the prayer of the petition, whether the proposed improvement, its kind, and the points between which it was to be made, and the like, were sufficiently stated; and it is not necessary that the record of the board shall show an express finding upon such facts, as such finding will be presumed in support of the proceedings, if the record shows an order granting the petition, or for the taking of the steps necessary to the accomplishment of the end designed; and herein, the order for the appointment of the viewers and engineer, and fixing the time and place of their meeting, is equivalent to a finding of the facts necessary to be found, and to an adjudication of the board, that the petition itself is sufficient, which adjudication can not be collaterally attacked. *Ib.*
4. *Same.—Petition May Include Line of Road with Branches.*—The act of 1877, *supra*, does not authorize the including of more than one improvement in a single petition, but does not forbid a petition for an improvement, whether it be a single continuous line, or a line with branches, so long as all the parts are connected. *Ib.*
5. *Same.—Description of Improvement.—Specifications.*—Where, under said act, the petition states that it is for a gravel road, that is a sufficient description of the kind of improvement prayed for, no other specification being required until the board of commissioners comes to order the improvement made. *Ib.*
6. *Same.—Statute Construed.—When Jurisdiction of County Commissioners not Lost.*—The viewers and engineer appointed by a board of commissioners, upon a petition for the construction of a free gravel road, under the act of March 3d, 1877, *supra*, made report at the next regular session after their appointment, but the schedule of lands reported benefited was not spread of record therewith, and, the record reciting that the petition was not then signed by the requisite number of landholders, the matter was continued. No record of any steps taken in relation thereto at the next regular session was shown, but, at a special session following, the viewers and engineer again made report, which, with the schedule of lands benefited, was spread of record, no one objecting; and, upon proof being made that the petition had been signed by the requisite number of landholders, the board ordered the work.

Held, that the provisions of section 12 of said act were sufficient to prevent a loss of the jurisdiction of the board of commissioners by its failure to act upon the report or enter a continuance thereof at its regular session. *Ib.*

GUARDIAN AND WARD.

1. *Failure of Guardian to Render Account.*—The language of section 9, 2 R. S. 1876, p. 589, which makes it the duty of a guardian to render an account at least once in every two years, under a penalty of ten per cent. damages, is too clear to require, or admit of, construction. The duty imposed is reasonable, and, if neglected, the burden imposed by the statute should be borne without complaint.

Eiceman v. State, ex rel., 46

2. *Insufficient Answer to Complaint Assigning Failure to Report.—Bond.—Demand.*—An answer by a guardian to a complaint of his ward, upon his bond, which avers that he was removed from his trust, re-appointed thereto, and again removed; that he has always made reports as required by law, unless prevented by sickness or unavoidable absence; that he was ignorant of the transfer of guardian business to the circuit court, and thereby was once in default; that no injury resulted therefrom to his ward; that she was indebted to him for board; that she commenced her action just one hour after her marriage to her plaintiff, and before he could satisfy himself that he could safely turn over her estate to her, and that he has been willing and in a condition at all times since his removal to pay it over to her upon demand, but no demand has been made, is insufficient as a plea in abatement, while admitting the failure to report from May 8th, 1871, until August 5th, 1873, assigned as a breach of the bond. *Ib.*
3. *Removal.—Insufficient Cause.—Special Verdict.—Evidence.—Supreme Court.*—Where, on trial of a petition for the removal of a guardian, a clause of the special verdict was that "Said guardian has managed the estate of said wards for their best interests, except he has failed to provide suitable homes, and to attend properly to the school education of said wards," and judgment was rendered removing the defendant from his trust as guardian, the Supreme Court, being satisfied from the evidence that he had done as well as he could under the circumstances, in the way of furnishing homes for his wards, and in attending properly to their education, reversed the judgment. *Rooker v. Wise, 306*

HABEAS CORPUS.

See CRIMINAL LAW, 36, 37; PARENT AND CHILD.

HEIR.

See CONVEYANCE, 2 to 5; DECEDENTS' ESTATES, 22, 23; PARTITION, 2, 5; PROMISSORY NOTE, 43, 45.

HIGHWAY.

See CITIES AND TOWNS, 9 to 10; GRAVEL ROAD; NEGLIGENCE, 2; TRESPASS, 5.

1. *Dedication.—Right of Public.—Assent of Owner to Use of Land.—Public Accommodation and Private Rights.*—The right of the public to a highway does not rest upon a grant by deed, nor upon a twenty years' possession, but upon the use of the land, with the assent of the owner, for such length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment. *Campbell v. O'Brien, 222*
2. *Same.—Estoppel.—Vendor's Claim Against Public.*—After public rights have intervened, the owner of land used as a highway with his assent is estopped thereby, and can not enforce a vendor's claim against the public. *Ib.*
3. *Pleading.—Remonstrance.*—A remonstrance or objections filed to the vacation of a highway, which fails to show that any of the remonstrants were freeholders of the county, or that they resided along the highway proposed to be vacated, was properly struck out on motion. *Early v. Hamilton, 376*

HOUSEHOLDER.

See PROMISSORY NOTE, 13.

HUSBAND AND WIFE.

See CONVEYANCE, 2, 4; CRIMINAL LAW, 11 to 13; MARRIED WOMAN; MORTGAGE, 10, 11; PARTITION, 1 to 3; PARTNERSHIP, 3; TRUSTS AND TRUSTEE, 3.

1. *Partnership of Wife in Business with Another.—Pleading.—Complaint.—Answer.—Demurrer.*—In an action (accruing before 1879), by a married woman and her husband, against the executor of her deceased partner in business, for the value of a life insurance policy assigned to her by the deceased for his board and her attention to their partnership business in his absence, an answer that plaintiff, at the time the partnership agreement was made, was and ever since had been a married woman, the wife of her co-plaintiff, living with him as his wife, constitutes no defence. *Cranor v. Winters, 301 Ib.*
2. *Coverture no Defence.—Wife's Earnings.*—The earnings of the wife during marriage belong to her husband, and, in the absence of an averment that he gave them to his wife, or that she was carrying on business with her separate property, he had a right to bring suit therefor, making the wife a co-plaintiff, as the meritorious cause of action. To such an action the coverage of the wife is no defence. *Ib.*
3. *Same.—Set-Off.—Former Adjudication.—Answer of Discharge and Satisfaction.—Former Credit of Demand.*—In such action, an answer of coverage and that the partnership business had been settled, that the wife bought the interest of her partner, the testator, giving in part payment a note of her husband and another; and that in a suit on the note the husband pleaded as a set-off the identical services, boarding and claim mentioned in the complaint, and was allowed and received a credit therefor on his note, in full discharge and satisfaction of the demand sued on, contains a good defence. *Ib.*
4. *Same.—Plea of Payment.*—In such action, an answer that “the claim set up in the plaintiff's complaint had been fully paid before the commencement of this suit,” was a good defence. *Ib.*

INCEST.

See CRIMINAL LAW, 32, 33.

INDICTMENT.

See CRIMINAL LAW, 1, 7, 26, 43, 46.

INFANT.

See BASTARDY, 4.

1. *Practice.—Infant Plaintiff.*—An action to correct a mistake in a decree, set aside a deed, quiet title and for partition, may be commenced by an infant. *Edwards v. Beall, 401 Ib.*
2. *Same.—Age of Plaintiff.—Complaint.—Answer.*—Unless the age of the plaintiff is stated in the complaint, or in an answer setting it forth, the record does not present the question of his infancy and incapacity to sue. *Ib.*

INJUNCTION.

See EXHIBITS, 1; GRAVEL ROAD, 1.

1. *Good-Will.—Obligation not to Engage in Business Sold or Aid Others.—Breach.—Remedy.*—Where P. sold his business to B. and C.. and obligated himself to them, or either of them, never again to engage in the business in L., or to aid, encourage, or advise others so engaged, and C., having sold all his interest in the contract to B., engaged in the business in L., and was aided, encouraged and advised by P., adequate damages can not be estimated for the breach of such covenant, and consequently injunction was B.'s proper remedy against both P. and C., the one from giving, and the other from receiving, the aid. *Baker v. Pottmeyer, 451 Ib.*
2. *Same.—*In such case, the business being packing and selling ice, a finding that ice was packed by C. with the aid of P., but not for the purpose of selling in L., would not entitle B. to judgment. *Ib.*
3. *Same.—Leasing Premises.—Preference.*—In such case, a lease of his ice-houses to C. by P. would not be such a breach of his covenant to

give B. and C. the preference, as to entitle B. to an injunction, C. not being under any obligation to keep out of the ice business on his own account. *Ib.*

4. *Same.—Exclusion from Possession.—Forcible Entry and Detainer.*—If, in such case, P., colluding with C., broke in and violently excluded B. from possession, an action for forcible entry and detainer would have afforded B. appropriate and prompt relief. *Ib.*
5. *Same.—Refusal to Accept Renewal of Lease.—Waiver of Preference.*—In such case, if B. refused to accept a renewal of his lease, at a price named, his consent was not necessary to the legality of a lease thereafter made, on the same terms, to another, notwithstanding his right of preference. *Ib.*

IMPRISONMENT.

See STATUTE OF LIMITATIONS, 1, 3.

INSTRUCTION.

See CRIMINAL LAW, 5, 25, 33 to 35, 49; PARTNERSHIP, 5; PRACTICE, 1, 8, 10, 12, 13; RAILROAD, 3, 4; REPLEVIN, 11, 12, 16; SUPREME COURT, 2, 8; TRESPASS, 2.

1. *Weighing and Comparing Evidence.—Province of Jury.*—An instruction, in which the court undertakes to tell the jury the effect or weight of portions of the evidence, how to compare them one with another, and what portions are supported by other portions, is erroneous. The court, in so doing, usurps the powers and invades the province of the jury. *Wood v. Deutchman, 148*
2. Where all the instructions, taken together, state the law applicable to the case fully and correctly, the fact that a single clause standing alone fails to do this, can not be made available to reverse the judgment. *Colee v. State, 511*
3. A single instruction entirely correct and relevant can not be declared erroneous because it does not gather up and group together all the various elements of the case. *Ib.*

INSURANCE.

See PROMISSORY NOTE, 3 to 6.

1. *Life Insurance.—Modification of Policy.—Violation of Modified Terms.*—It is competent for the parties to a policy of life insurance to modify or change its terms in regard to the payment of the annual premium; and if the insurer violate and fail and refuse to comply with the modified terms of the policy, a cause of action accrues thereon in favor of the assured, if he be not in default. *Phoenix Mut. Life Ins. Co. v. Hinesley, 1*
2. *Same.—Evidence.—Variance.*—Where the plaintiff's evidence on the trial showed that for seven consecutive years the premiums on the policy were paid after they were due, instead of ten as alleged, it fairly tended to establish the substance of the issue, although it did not cover the full period of ten years, as alleged. *Ib.*
3. *Same.—Evidence.—Waiver.—Foreign Insurance Company.—Notice to General Agent is Notice to Company.*—Where a foreign insurance company has a general agent in this State, who superintends and manages its insurance business in the State, collects premiums and countersigns receipts given for premiums paid to him, notice to such agent that premiums were paid by consent and waiver after they were due, and in relation to any other business of insurance transacted by him for his company, is notice to the company. *Ib.*
4. *Fire Insurance.—Policy.—Insurable Interest at Time of Delivery and of Loss.*—A complaint on a policy of insurance against loss by fire is not sufficient if it show an insurable interest at the time of delivery

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only. It should also allege that the assured had an insurable interest at the time of the loss. *Home Ins. Co. v Duke*, 535

5. *Same.—Complaint on Policy Assigned After Loss.—Insurable Interest at Time of Delivery Insufficient.—Demurrer.*—The complaint on a policy of insurance assigned after loss, averring that the defendant "did insure" plaintiff's assignor "on his one-story frame house," and setting forth a copy of a policy of insurance "on his one-story frame storehouse," "his shelving, counters, desks, and scales contained in said storehouse," sufficiently shows an insurable interest in the assured at the delivery of the policy, but, failing to aver that he was interested in the property at the time of the loss, is insufficient on demurrer. *Ib.*

INTEREST.

See PROMISSORY NOTE, 16, 17, 21 to 25; TRUST AND TRUSTEE, 8.

Account.—Interest may be recovered on an open account, the payment of which has been long withheld. *Rend v. Boord*, 307

INTERROGATORIES.

See PRACTICE, 7, 14.

JEOPARDY.

See CRIMINAL LAW, 38.

JOINT TENANCY.

See CONVEYANCE, 3.

JUDGMENT.

See ATTACHMENT; APPEAL, 2; CRIMINAL LAW, 9, 36; DECEDENTS' ESTATES, 14 to 18, 24 to 28; EXHIBITS, 1; GRAVEL ROAD, 3; JURISDICTION; MARRIED WOMAN, 3; PARTITION, 9, 10; PRACTICE, 11, 16, 17, 32, 33, 43, 46; PROMISSORY NOTE, 28, 29; SHERIFF'S SALE; SPECIAL VERDICT, 3; SUPERIOR COURT; SUPREME COURT, 7, 14, 28; VENDOR AND PURCHASER, 2.

1. *Debt not Due.*—A personal judgment rendered for a debt not due is clearly erroneous, but not absolutely void.

Query.—Has it not sufficient legal force to withstand collateral attack?

Gall v. Fryberger, 98

2. *Transcript.—Lien.*—In order that a judgment shall constitute a lien upon real estate in a county other than that where rendered, a transcript thereof must be entered and recorded in the judgment docket of such county. *Bell v. Davis*, 314

3. *Same.—Real Estate.—Duty of Purchaser.—Diligence.*—If, before the purchase of real estate, the purchaser, having received information that a transcript of a judgment against the owner had been filed, goes to the proper officers, and in good faith causes an examination of the records to be made, and they disclose the fact that there is no judgment lien, he is justified in acting upon the belief that there is none. *Ib.*

4. *Merger.*—A cause of action in suit is merged in the judgment rendered thereon. *Ward v. Haggard*, 381

5. *Justice of the Peace.—Jurisdiction of Defendant.—Garnishment.—Attachment.*—A judgment of a justice of the peace, without jurisdiction of the defendant, who is absent from the State, is void; and where a judgment against an attachment defendant is void, a judgment against a garnishee under the attachment can not be enforced. *Matheney v. Earl*, 531

6. *Same.—Practice.*—Where an action before a justice, in which one was summoned as a garnishee, was not a proceeding in attachment, but was so considered by the plaintiff therein and the justice, it should be treated as having been based upon and having grown out of, an ordinary cause in attachment. *Ib.*

JURISDICTION.

See GRAVEL ROAD, 3 to 6.

1. *Judgments of Inferior Courts.* — *Presumptions.* — *Collateral Attack.* — When the jurisdiction of an inferior tribunal is once established over the subject-matter of, and the parties to, a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevail in favor of the action of courts of general powers, and its judgments are alike unassailable by collateral attack. *Stoddard v. Johnson*, 20 *Ib.*
2. *Same.* — Where an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its determination is conclusive as against collateral attack. *Ib.*

JUROR.

See CRIMINAL LAW, 4, 6, 21.

JURY.

See CRIMINAL LAW, 22, 24, 30, 34; INSTRUCTION, 1; PRACTICE, 13, 14.

JUSTICE OF THE PEACE.

See APPEAL, 1; COSTS; JUDGMENT, 5, 6; PRACTICE, 41; REPLEVIN BAIL.

LANDLORD AND TENANT.

1. *Action for Rent After Expiration of Term of Lease.* — *Surrender of Premises.* — *Payment of One Month's Rent.* — Where a tenant occupying premises under a lease for five years, the rent being payable at the end of each month, held over, and, on the third day of the month beyond the term, notified the landlord in writing, that he would surrender such premises at the expiration of the month, and paid that month's rent, leaving the keys of the building on a table in the landlord's office, he did not thereby effect a surrender of the premises, and is liable in an action for rent accruing thereafter. *Tolle v. Orth*, 298 *Ib.*
2. *Same.* — *Tenancy from Year to Year.* — By voluntarily remaining in possession beyond the term of the lease, the tenant gave the landlord the option of treating him as tenant for another year, upon the same terms of payment as had before prevailed, and the acceptance of the money tendered with the keys of the building does not affect the question. *Ib.*
3. *Same.* — *Acceptance of Rent.* — Where rent is unconditionally due, the landlord may accept the money and reject the keys of the building, if tendered. *Ib.*

LEASE.

See INJUNCTION, 3 to 5; LANDLORD AND TENANT, 1, 2.

LEGACY.

See DECEDENTS' ESTATES, 1, 2, 29, 30.

LEVY.

See EXECUTION; PARTNERSHIP, 3; REPLEVIN, 15.

LEVY AND SALE.

See CHATTEL MORTGAGE, 10; REPLEVIN, 15.

LIEN.

See ATTACHMENT; BANKRUPTCY; CHATTEL MORTGAGE, 3, 4; CONTRACT, 2; JUDGMENT, 2; MORTGAGE, 4, 11; SHERIFF'S SALE, 6; SUPERIOR COURT, 2; TAX TITLE, 2, 3; TRUSTS AND TRUSTEE, 1, 2; VENDOR AND PURCHASER, 7.

LIFE-ESTATE.

See CONVEYANCE, 2.

LIFE INSURANCE.

See INSURANCE, 1 to 3; PRACTICE, 1.

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LIQUOR LAW.

Sale to Minor.—License.—Under the provisions of the act of March 17th, 1875, 1 R. S. 1876, p. 871, the sale of intoxicating liquor to a minor is one of the prohibited sales which a license does not authorize a vendor by retail to make; and hence, in a prosecution for such a sale, it is immaterial whether the defendant has or has not a license to sell to another and a different class of persons.

State v. Hamilton. 238; *State v. Gowgill,* 599

LIS PENDENS.

See CHATTEL MORTGAGE, 1, 2; PLEADING, 2.

MALICE.

See CRIMINAL LAW, 7 to 9; SLANDER, 5.

MANDATE.

1. *Practice.—Writ of Mandate.—How Obtained.*—A writ of mandate is properly obtained upon a motion in open court, founded upon an affidavit or petition sworn to and filed. *Potts v. State, ex rel.,* 336
2. *Same.—Alternative Writ, How Served and Returned.*—An alternative writ of mandate is served by delivering the writ itself to the party, and the sheriff's return of service is made upon a certified copy of the writ. *Ib.*
3. *Same.—Demurrer to Complaint.*—A demurrer to the complaint or petition, or affidavit, and the order or writ issued thereon, raises the question of the sufficiency of the cause of action. *Ib.*
4. *Same.—Answers Equivalent to Return.—Demurrer.—Reply.*—In such case, answers to a complaint may be regarded as constituting substantially a return to the writ, and may be demurred or replied to. *Ib.*
5. *Township Trustee.—Supervisor of Highways.*—A complaint, affidavit or petition, on the relation of a supervisor of highways, against the trustee of the township, alleging that the relator had allowed a laborer for work done, and had given him an order for its payment, and that said trustee, on demand, refused to pay said order out of moneys in his hands applicable to its payment, contains facts sufficient to warrant the issuing of an alternative writ, and, on proper proof, to warrant a judgment that a peremptory writ of mandamus issue against the defendant, commanding him to pay said order from the road tax in his hands. *Ib.*
6. *Practice.—Summons.*—A summons is not necessary in a proceeding for mandate. The alternative writ is the proper process. *Ib.*

MANSLAUGHTER.

See CRIMINAL LAW, 8, 9.

MARRIAGE PROMISE.

1. *Pleading.—Complaint.—Objection Cured by Verdict.—Motion in Arrest of Judgment.—Breach of Promise to Marry.—Consideration.—Mutual Promise.*—After verdict upon the trial of a complaint for breach of promise to marry, an objection that the complaint, in stating the mutual promises of the parties, alleged that the defendant's promise was made in consideration that the plaintiff *would* promise to marry him, and not that she *did* promise, was cured by the verdict, and came too late on motion in arrest of judgment. *Felger v. Etzell,* 417
2. *Same.—Evidence of Illicit Intercourse Inadmissible.*—On trial of an action for breach of a promise to marry, where the complaint contained no allegations of illicit intercourse between the parties, and no answer was filed, evidence of such illicit intercourse was inadmissible to prove a promise to marry, or enhance the damages, or for any other purpose. *Ib.*

MARRIED WOMAN.

See EXECUTION, 2; HUSBAND AND WIFE; TRUSTS AND TRUSTEE, 3.

1. **Separate Property.—Consent to Transfer.—Instruction.—Husband and Wife.**—Upon the trial of an action by a married woman to foreclose a mortgage executed to her, in which the question arose as to whether she had agreed or consented to a transfer of the notes secured thereby to a creditor of her husband, to whom the payee alleged he had paid the notes, the court instructed the jury that a married woman “can not be divested and deprived of her notes or other property by her husband or any one else, without her agreement and consent.”

Held, that “or” and not “and” should have connected the words “agreement” and “consent” in such instruction. *Paulman v. Claycomb*, 64

2. **Same.—Consent of Husband to Transfer of Wife's Personal Property.—Case Distinguished.**—Prior to the act of March 25th, 1879, Acts 1879, p. 160, under the law in this State, a married woman could not transfer her separate personal property except by the consent of her husband, but it was not necessary that such transfer should be by deed in which the husband should join; and, when the consent of the husband was obtained, it was not material how such consent was evidenced. *The American Insurance Co. v. Avery*, 60 Ind. 566, distinguished. *Ib.*
3. **Judgment.—Collateral Attack.**—Where, in an action to foreclose a mortgage, it appears in the complaint that one of the defendants is a married woman, it is error to permit a personal judgment to be taken against her; but such judgment is not void, nor can it be collaterally attacked. *Gall v. Fryberger*, 98

MEASURE OF DAMAGES.

See TRESPASS, 3, 4.

MERGER.

See JUDGMENT, 4; MORTGAGE, 8, 12; PLEADING, 10.

MINOR.

See INFANT; LIQUOR LAW.

MISJOINDER OF CAUSES OF ACTION.

See TOWNSHIP TRUSTEE, 6.

MISTAKE.

See CONVEYANCE, 5; MORTGAGE, 8; PARTITION, 10, 11; PLEADING, 7; VENDOR AND PURCHASER, 12.

MORTGAGE.

See CHATTEL MORTGAGE; DECEDENTS' ESTATES, 12, 13; MARRIED WOMAN; PARTITION, 8 to 11; PROMISSORY NOTE, 30, 32; REAL ESTATE, ACTION TO RECOVER, 12 to 14; REPLEVIN, 13, 14; SHERIFF'S SALE, 6; TRUSTS AND TRUSTEE, 1, 2; VENDOR AND PURCHASER.

1. **Payment in Sawing Logs.—Log Measure or Board Measure.—Satisfaction.—Evidence.—Contract Construed.—Reversal and New Trial Granted.**—Where a mortgagor agreed, in writing, to pay the mortgage debt in sawing lumber, at specified rates per one hundred feet for walnut and oak and other logs, and, upon trial of an issue as to its satisfaction, wherein the principal matter of controversy was whether the contract provided for log measure or board measure, and the jury, construing the contract as providing for log measure, found the mortgage to be satisfied. On appeal,

Held, that the Supreme Court, in the absence of any evidence of construction by the lower court, construes the obligation to mean that the price stipulated was for lumber sawed and prepared for the market, and that the verdict of the jury was not sustained by sufficient evidence, they having adopted a false basis in their estimate of the amount paid on the mortgage. *Dutch v. Anderson*, 35

2. *Same.*—The terms of such obligation, in the absence of evidence that any deception was practiced upon the mortgagor, or that he did not or could not read it, or that it was not drawn in strict conformity with the understanding and purpose of the parties, are conclusive. *Ib.*
3. *Release Obtained by Fraud.*—As between the parties thereto, a mortgage exists in full force, unaffected by a release obtained from the mortgagee by the fraud of the mortgagor. *Burton v. Reagan*, 77
4. *Innocent Purchasers.*—*Mortgage Lien.*—*Fraud.*—Innocent purchasers of land take it discharged of a mortgage lien which has been released, although the release may have been obtained by fraud. *Ib.*
5. *Deed and Title Bond.*—A deed and a title bond for reconveyance may constitute, in legal effect, a mortgage. *Lentz v. Martin*, 228
6. *Foreclosure.*—*Purchase-Money.*—*False Representations.*—*Verdict.*—*Damages for Mortgagor.*—*Application of,—Notes Due and not Due.*—Where, in an action to foreclose a mortgage to secure notes for purchase-money due and to become due, a verdict was returned for plaintiff and damages allowed defendant on answers of false representations and set-off, and the court, on plaintiff's motion, without objection, looked behind the verdict to ascertain how much was, and how much was not due, and applied all, or nearly all, of defendant's damages to the notes not due, the judgment was erroneous.
Brown v. Shirk, 266
7. *Same.*—*Application of Credits.*—In such case, the defendant had a right to apply the damages found due to him; and, if the application devolved upon the court, it should have applied the amount to the discharge of the amount due the plaintiff. *Ib.*
8. *Mutual Mistake.*—*Merger.*—*Res Adjudicata.*—*Judgment not a Bar.*—Where a mortgage, by mutual mistake, contained an erroneous description of the land intended to be mortgaged, and the subsequent proceedings, including the sheriff's deed, contained the same mistake, the mortgage was not thereby so merged in the judgment as to make the question of description one of *res adjudicata*; but the mortgage may be foreclosed notwithstanding such judgment.
Conyers v. Mericles, 443
9. *Same.*—*Proceeding Nugatory.*—In such case, the whole proceeding is infected by the original mistake, and is baseless, unsubstantial and nugatory, and is no obstacle to the reformation and foreclosure of the mortgage. *Ib.*
10. *Real Estate.*—*Bankruptcy of Mortgagor.*—*Assignee's Conveyance to Mortgagee.*—*Inchoate Interest of Mortgagor's Wife Vested.*—*Descent at Her Death.*—In an action to foreclose a mortgage, a cross complaint of the husband, his wife being dead, alleging that the mortgagee procured and accepted a conveyance from his assignee in bankruptcy for his two-thirds of the land, and claiming to hold the one-third vested in his wife and inherited by him at her death free of the mortgage, is insufficient on demurrer. *Haggerty v. Byrne*, 499
11. *Same.*—*Descent to Husband.*—*Interest of Wife Subject to Mortgages.*—Where the husband inherits the wife's one-third interest acquired by her under the act of March 11th, 1875, 1 R. S. 1876, p. 554, he inherits it, as she took and held it, subject to mortgages that were liens. *Ib.*
12. *Same.*—*Assignee's Deed not Satisfaction.*—An assignee's deed to the mortgagee does not in equity operate to satisfy the mortgage, but implies that the land would not more than satisfy it, and the mortgagee's acceptance does not imply an intention that the mortgage shall be merged in the fee. *Ib.*
13. *Same.*—*Case Distinguished.*—In such case, an acceptance of a deed for two-thirds will not release the remaining one-third of the mort-

gaged land, unless such be the plain intention at the time, and upon foreclosure the holder of the one-third may not claim to have the two-thirds first sold. *Medsker v. Parker*, 70 Ind. 509, distinguished. *Ib.*

- 14. Practice.—Foreclosure.—Directions for Sale.—Motion in Supreme Court.**—Where, upon judgment of foreclosure, a motion was made for directions as to the sale of property, and such directions were given as the equities of the parties demanded, there was no error; but a motion for such directions can not be first made in the Supreme Court. *Ib.*

MUNICIPAL CORPORATION.
See CITIES AND TOWNS.

MURDER.
See CRIMINAL LAW, 7, 11.

NAME.
See CRIMINAL LAW, 26.

NEGLIGENCE.

See CITIES AND TOWNS, 7, 12, 15, 16; PLEADING, 11; RAILROAD, 3 to 7.

1. **Contributory Negligence.—Pleading.—Complaint.—Railroad.**—In an action against a railroad company for injuries to plaintiff's intestate, caused by his falling into a culvert constructed by the defendant under its track in a public street of a city, and by defendant negligently permitted to remain open and uncovered, a complaint which avers that the intestate, "while exercising due and reasonable care and without his fault or negligence on his part," fell into and through the opening in the culvert, sufficiently alleges that he was not guilty of contributory negligence. *T., W. & W. R. W. Co. v. Brannagan*, 490
2. **Same.—Highway.—Knowledge of Defect.—Reasonable Care.**—Knowledge of the existence of a dangerous defect in a highway makes it incumbent on the traveller to use care and caution proportionate to the danger which he knows lies in his way; but knowledge will not overcome an explicit averment of reasonable care and prudence. *Ib.*
3. **Same.—Evidence.**—Where, on the trial of such action, the evidence showed that the intestate lived near the culvert and was familiar with its character and location, and no evidence was given to show that he was free from contributory negligence, there is an utter failure of proof. *Ib.*
4. **Same.—Presumption.**—There is no presumption that one who claims damages for injuries caused by the negligence of another was himself free from fault. *Ib.*

NEW TRIAL.

See CONTRACT, 3; CRIMINAL LAW, 20 to 24; PRACTICE, 4, 15; SUPREME COURT, 5, 10, 15, 17.

1. **Practice.—Evidence.**—As a rule, a new trial will not be granted for the purpose of affording a party an opportunity to impeach a witness by newly-discovered evidence. *Humphreys v. State*, 469
2. **Same.**—Unless the newly-discovered evidence is of such materiality as to render it likely that it would produce a different result, a new trial should not be granted. *Ib.*
3. **Same.—Surprise.**—Where the testimony of an adverse witness is such as was to be reasonably expected, a new trial should not be granted on the ground of surprise at such testimony. *Ib.*

NOMINAL DAMAGES.

See REPLEVIN, 7; SUPREME COURT, 28; TRESPASS, 2.

NOTICE.

See ACTIONS IN REM; INSURANCE, 3; PARTNERSHIP, 6; SHERIFF'S SALE, 1, 2; TRUSTS AND TRUSTEE, 6; VENDOR AND PURCHASER, 1 to 4.

Performance of Contract.—Where one party to a contract gives notice to the other of his determination not to perform on his part, performance by the party receiving such notice is unnecessary.

Phoenix Mut. Life Ins. Co. v. Hinesley, I

OFFICE AND OFFICER.

See CITIES AND TOWNS, 5; CONVERSION, 2; CRIMINAL LAW, 44, 45; EVIDENCE, 2.

OPINION.

See CRIMINAL LAW, 29; EVIDENCE, 7.

ORDER FOR MONEY.

1. *Action on Promise.—Consideration.—Pleading.*—Where an order is given payable out of a particular fund, it operates as an equitable assignment of so much of such fund as is specified in the order, and in a suit therefor no consideration need be averred for the promise of the holder of the fund to pay it. *Indiana Manuf'g Co. v. Porter, 428*
2. *Same.—When Promise of Drawee to Pay not Necessary.*—An obligation of the holder of such fund to pay the drawer of such order imposed upon him the duty to pay the payee of the order, and, if he received and retained the money as alleged, the payee can maintain a suit therefor against the holder of the fund without an express promise to pay it. *Ib.*
3. *Same.—Demand.*—If, before such suit, any demand was necessary, the allegation in the complaint, that "the defendant refused to pay the plaintiff, though often requested," shows a sufficient excuse for not making a formal demand for payment. *Ib.*

PARENT AND CHILD.

Divorce.—Custody of Child.—Habeas Corpus.—Evidence.—Upon the trial of an application by a divorced wife for a writ of *habeas corpus* against her divorced husband, and her verified complaint, for the custody of their child, evidence that the child was five years old, weighing but a little over thirty pounds, and was not a hearty boy, sufficiently sustains a finding of the trial judge in favor of the mother, and a judgment that the care, custody and control of the child be given to her. In such case, the mother, unless an unfit person, ought to have the care, custody, and control of the child. *Reeves v. Reeves, 342*

PARTITION.

See CONVEYANCE, 6; TAX TITLE, 6.

1. *Real Estate.—Pleading.—Complaint by Widow.*—In a petition by a widow for partition of the lands of her husband, an allegation that she owned one-third of the land argumentatively asserted that she was the first wife, or a subsequent wife having children by her husband, alive at his death. *Utterback v. Terhune, 363*
2. *Same.—Complaint by Heirs to Review.*—A complaint by children against the widow, to review proceedings and judgment in partition, which shows that on their default partition was decreed in her favor, adjudging her to be the owner in fee simple of one-third of the land, and setting it off to her in severalty, although she was the third wife of their father, and had no children by him, was insufficient on demurrer. *Ib.*
3. *Same.—Widow not Presumed to have been Second Wife.*—A widow will not be presumed to have been a second or subsequent wife. *Ib.*
4. *Partition Gives no New Title.*—A judgment in partition does not, ordinarily or necessarily, vest in the co-tenants a new title, but each has the title he had before. *Ib.*
5. *Surviving Wife Takes a Fee.—Descents.—Children of Former Wife Heirs.—Statute Construed.*—Under section 24 of the statute of descents, I R.

- S. 1876, p. 412, the surviving wife takes a fee, and the children by a former wife take as forced heirs of the surviving wife, at her death. *Ib.*
6. *Pleading.—Complaint.—Practice.—Finding.—Supreme Court.*—Objections to a complaint for partition of real estate for failing to state specifically the title of the parties to the land, and that they held the same as tenants in common, made for the first time in the Supreme Court, are not available to reverse the judgment below, where the finding of the court was that the parties were the owners in fee and tenants in common of such land. *Lewis v. Bortsfield, 390 Ib.*
7. *Same.—Defects Cured by Evidence and Finding.*—Such defects are of that character which might have been, and doubtless were, supplied by the evidence, and cured by the finding of the court. *Ib.*
8. *Mortgage.—Reformation and Foreclosure.*—In a proceeding for partition, a mortgagee defendant may by counter-claim procure the reformation of his mortgage and a foreclosure. *Conyers v. Mericles, 443*
9. *Same.—Answer of Judgment on Note no Defence.*—In such case, an answer that a judgment on the note secured by the mortgage is in full force constitutes no defence, to bar foreclosure. *Ib.*
10. *Same.—Incorrect Description of Lands Intended to be Mortgaged.*—When an incorrect description of lands intended to be mortgaged is carried into the judgment, order of sale, notice and sheriff's deed, such proceedings can not be corrected, either at the instance of the mortgagee or the purchaser at such sale. *Ib.*
11. *Same.—Correction by Reforming and Foreclosing Mortgage.*—Such mistake may be corrected by reforming the mortgage and foreclosing it as reformed. *Rogers v. Abbott, 37 Ind. 138; Miller v. Kolb 47 Ind. 220; and Angle v. Speer, 66 Ind. 488, distinguished.* *Ib.*

PARTNERSHIP.

See CHATTEL MORTGAGE, 4; HUSBAND AND WIFE, 1; PROMISSORY NOTE, 15.

1. *Promissory Note.—Firm Indebtedness.*—When a partnership is dissolved, and the partner remaining in business assumes and agrees, upon a sufficient consideration, to pay all debts of the firm, such partner has no authority after the dissolution to borrow money and sign the name of the late firm to a note for the purpose of getting money to pay the firm indebtedness. *Hayden v. Cretcher, 108*
2. *Same.—Note Executed by Partner in Firm Name, After Dissolution of Firm, Not Binding on Retiring Partner.—Special Finding.*—In an action upon a note executed by a partner in the firm name, after the dissolution of the partnership, and for money borrowed by such partner, without the authority or consent of the retiring partner, against him, the court found specially that the plaintiff, the payee of the note, did not part with his money upon the credit of the firm, or upon the credit of the retiring partner, the defendant; that the money was delivered some time before the note was executed, and that the payee never knew that the defendant or his name was to be in any way connected with the note until the note was delivered to him, and that he knew that the firm had been dissolved.

Held, that the money thus borrowed was the individual debt of the partner who borrowed it and executed the note therefor, and not the debt of the defendant, and the note in suit not his note.

Held, also, that the fact that the money borrowed was used in payment of the firm's debts does not render the defendant liable for any part of such money, or upon the note given therefor. *Ib.*

3. *Husband and Wife.—Replevin.—Evidence.*—In an action by a wife against a constable to replevy goods levied upon as the property of

the husband, on a judgment against him, the evidence showed that the husband had entered into a partnership business upon money furnished him by his wife, and that the debt for which the levy was made was created during the partnership; that the wife furnished no money during the partnership; but, a short time before the levying of the execution, she had purchased the partner's interest, and that she had since purchased the goods levied on, with her own funds; that the husband had the entire control and management of the business after his wife's purchase of the partner's interest, and had an equal interest with his wife in the business.

Held, that the wife could not recover the goods as her individual property. *Clay v. Vanwinkle*, 239

4. *Ostensible Members of Firm.—Silent Partner.—Liability for Acts of Partner.—Conversion.—Evidence.*—Evidence that property was received by one member of a partnership, under an agreement to sell it, for a commission of "what was right," with property of the firm, and was by him mingled and sold with it, and the proceeds converted to his own use, such agreement being fairly within the scope of the business of the firm for years, and within the knowledge of the other members of the firm, ostensible and silent, supports a verdict and judgment against them for such conversion. *Todd v. Jackson*, 272
5. *Same.—Scope of Partnership Business.—Instruction.*—On trial of an action against the firm for such conversion, it is not error to refuse to instruct the jury, that, "In determining what comes within the scope of the partnership business, when there is a doubt about it, the rule which determines it rests upon the necessity of the case." *Ib.*
6. *Same.—Notice.—Contract.*—Where an agreement is in relation to a matter fairly within the scope of the partnership business, and made with a member of the firm, such agreement is binding on the firm in the absence of any evidence tending to show that the party contracting with such member had notice or knowledge that the contract was not, as it appeared to be, within the scope of the business of the firm. *Ib.*
7. *Same.—Innocent Persons.—Cause or Occasion of Loss.*—Where one of two innocent persons must suffer by the act of a third person, he must suffer who has been the cause or occasion of the confidence and credit reposed in such third person. *Ib.*
8. *Account.—Purchase by Agent.—Pleading.—Complaint.*—Where, in an action upon an account against a firm, the complaint averred that the goods were sold and delivered to an agent of the firm upon its order, it is immaterial for what purpose or for whose use the goods were intended. *Rend v. Boord*, 307

PAYMENT.

See CONVERSION, 2, 3; CRIMINAL LAW, 40; HUSBAND AND WIFE, 4; PLEADING, 5; PROMISSORY NOTE, 36; SUPREME COURT, 12; TAX TITLE, 3; VENDOR AND PURCHASER, 3, 5.

1. *Debt to be Paid.—Exchange.*—In all cases of payment there must be a debt to be paid. In the exchange of property no debt is created; one thing is given for another. *Atchinson v. Lee*, 132
2. *Application of General Payments.*—General payments are always applied on sums due, rather than on sums not due. *Brown v. Shirk*, 266
3. *Plea of Payment.*—A plea of payment need not allege the amount paid, nor the date of payment, nor the person to whom the payment was made. *Cranor v. Winters*, 301

PENALTY.

See TRUSTS AND TRUSTEE, 8.

PLEADING.

See ARBITRATION BOND; BASTARDY, 1; CITIES AND TOWNS, 15; CONTRACT, 2; CONVERSION, 1, 2, 4; CRIMINAL LAW, 37; DECEDENTS' ESTATES, 2, 3, 11, 13, 28; EXHIBITS; EXECUTION, 3, 4; GUARDIAN AND WARD, 2, 3; HIGHWAY, 3; HUSBAND AND WIFE, 1, 3, 4; INFANT, 2; INSURANCE, 5; MARRIAGE PROMISE, 1; NEGLIGENCE, 1; ORDER FOR MONEY; PARTITION, 1, 2, 6; PARTNERSHIP, 8; PAYMENT, 3; PRACTICE, 3, 19 to 24, 31, 34, 36 to 38, 42, 46; PROMISSORY NOTE, 3, 7, 10, 15, 26; PROSECUTING ATTORNEY, 4; REAL ESTATE, ACTION TO RECOVER, 5, 6, 7; REPLEVIN, 6; SCHOOL LAW, 2; SLANDER, 1, 2, 6; SUPREME COURT, 9; TOWNSHIP TRUSTEE, 2, 3, 5, 6; TRESPASS, 1; VENDOR AND PURCHASER, 1, 5.

1. *Practice.—Argumentative Denial.—Demurrer.*—An argumentative denial, deduced from facts well pleaded, is equivalent to a special denial of the inconsistent averments of the complaint, and may be good on demurrer. *Stoddard v. Johnson*, 20
2. *Answer.—Lis Pendens.*—An answer alleging that there is another suit pending for the cause of action declared upon, but not alleging when it was commenced, is bad on demurrer. *Eiceman v. State*, 46
3. *Recitals.—Exhibits.—Contract.*—As a rule, matters can not be pleaded by way of recital, and a mere recital in a contract can not supply the place of positive averment; but where a recital is used as signifying a stipulation, condition or promise, a pleading may be aided by the recital in an exhibit, though it can not where the matters are introductory and stated strictly by way of recital. *Jackson School Township v. Farlow*, 118
4. *Plaider Must State Facts, not Conclusions of Law.*—A pleader who seeks to bring himself within a statute must state, not in the form of a conclusion of law, but as a traversable fact, the act done by him and relied upon as bringing him within the statute. *Ib.*
5. *Answer.—Payment and Satisfaction.—Reply to One Paragraph by Reference to Another.*—A reply to a paragraph of answer pleading payment, which refers for facts to a paragraph of answer pleading satisfaction by an exchange, is bad on demurrer. The answer can not thus be made a part of the reply. *Atchinson v. Lee*, 132
6. *Same.—Exchange not Payment.*—Such paragraph of reply, even aided by the averments of the answer referred to, is bad, as an exchange of one piece of property for another is not a payment; nor would a reply that such exchange had been made through fraud practiced upon the plaintiffs by the defendants be good to an answer alleging payment. *Ib.*
7. *Application in Reply to Reform Written Instrument Declared on.—Departure.—Demurrer.*—A reply seeking to reform a written instrument, affirmed and declared on in the complaint, is a departure from the cause of action, and if it contain no allegation of mutual mistake made in its execution, either in the facts stated or omitted to be stated, nor that the parties, at the time it was executed, did not mutually understand, comprehend, or intend the writing as executed. It is insufficient on demurrer. *Wood v. Deutchman*, 148
8. *Complaint on Promissory Note.*—A complaint on a promissory note in the form prescribed by statute, 2 R. S. 1876, p. 357, form No. 1, is sufficient. *Baldwin v. Humphrey*, 153
9. *Written Instrument.—Demurrer.*—A statement in a pleading inconsistent with the legal effect of a written instrument made a part of such pleading is no cause for demurrer. *McDonough v. Kane*, 181
10. *Two Contracts of Same Substance.—First Merged in Second.*—Where two contracts are made part of a pleading, and the one last made

embraces the entire substance of the one first made, the first contract will be regarded as merged in the second, and the fact that the merged contract is set forth in the pleading, and treated by the pleader as subsisting, and the real contract treated as a mere recital of the first, does not render the pleading bad on demurrer. *Ib.*

11. *Actionable Negligence.*—Negligence or no negligence must be determined from the facts pleaded, not from the presence or absence of general epithets. *Weis v. City of Madison*, 241
12. *Cause of Action.*—*Complaint.*—*Cross Complaint.*—The cause of action set forth in a cross complaint must arise upon, or grow out of, the cause of action stated in the original complaint, and not be independent thereof. *Williams v. Boyd*, 286
13. *Practice.*—*Complaint.*—*Defective Averment.*—*Substantive Fact.*—*Defects Cured by Verdict.*—A defective averment in a complaint may be cured by a verdict; but, if the complaint omits to allege any substantive fact which is essential to a right of action, and which is not implied in, or inferable from, the finding of those which are alleged, a verdict for the plaintiff does not cure the defect. *Home Ins. Co. v. Duke*, 535

POOR PERSON.
See CRIMINAL LAW, 27.

PRACTICE.

See ACTIONS IN REM; BILL OF EXCEPTIONS; CHATTEL MORTGAGE, 1, 2; CITIES AND TOWNS, 16; CONTRACT, 3; COSTS; CRIMINAL LAW, 10, 13 to 15, 19 to 25, 28; DECEDENTS' ESTATES, 11; EXHIBITS; EXECUTION, 3; INFANT, 1; JUDGMENT, 6; MANDATE, 1 to 4, 6; MORTGAGE, 14; NEW TRIAL; PARTITION, 6; PLEADING, 1, 5, 13; PROMISSORY NOTE, 2; PROSECUTING ATTORNEY, 4; REAL ESTATE. ACTION TO RECOVER, 5; REPLEVIN, 3, 16; SLANDER, 2; SPECIAL FINDING; SPECIAL VERDICT; SUPREME COURT; TOWNSHIP TRUSTEE, 6; TRESPASS, 1, 2.

1. *Life Insurance.*—*Complaint.*—*Evidence.*—*Instructions.*—Where, on the trial of an action upon a policy of life insurance, evidence was given tending to establish the substance of the matters in issue, it was not error of the trial court to refuse to give an instruction that "The evidence entirely fails to support the second paragraph of complaint, and the plaintiff can not recover upon that paragraph of her complaint," and an instruction that "The evidence entirely fails to support the material allegations of the said fourth paragraph of the complaint, and the plaintiff can not recover under that paragraph." *Phoenix Mut. Life Ins. Co. v. Hinesley*, 1

2. *Same.*—*Variance.*—*Amendment.*—*Premium Note.*—*Supreme Court.*—A variance between premium notes as described in the complaint and as given in evidence is not fatal, where they are by their terms not payable until a cause of action has accrued in favor of the maker upon the policy of insurance issued to him by the payee, although the interest be payable annually in advance. Besides, it might have been obviated by amendment, which the Supreme Court will regard as having been made. *Ib.*

3. *Pleading.*—*Allegations and Proof.*—*Substantial Averments.*—*Substance of Issue.*—The rule that a party must recover upon the allegations of his pleadings *secundum allegata et probata*, or not all, does not require that all of the most substantial averments of a complaint must be proved, or that there must be evidence tending to prove them, in order to justify a refusal of an instruction that plaintiff is not entitled to recover. A plaintiff is not bound to prove every allegation of his complaint; it is sufficient if he establish the substance of the issue. *Ib.*

4. *New Trial.—Exceptions.*—A motion for a new trial “because of error of law” is too general in its terms. The particular rulings to which exceptions were taken, and because of which a new trial is asked, must be specified in the motion. *Dutch v. Anderson*, 35
5. *Construction of Contract.—Province of Court.*—It is the province of the court to construe a contract given in evidence, and, if asked, to instruct the jury accordingly. *Ib.*
6. *Answer.—Demurrer.—Search for Error.*—A demurrer to an answer will search the record and reach back to the complaint, and if the complaint fail to show a sufficient cause of action, it should be sustained as to it, and not as to the answer. *Gould v. Steyer*, 50
7. *Objections to Interrogatories.—Bill of Exceptions.—Supreme Court.*—Objections to an interrogatory propounded by the court to a jury must first be presented to the trial court, and its ruling preserved by a bill of exceptions, in order to make such objections available in the Supreme Court. *Paulman v. Claycomb*, 64
8. *Improper Argument of Counsel.—Change of Venue.—Instruction.—Presumption.*—Where, on the trial of a cause on a change of venue from another county, that fact is alluded to by counsel in the argument to the jury, it is not error for the court to instruct the jury that such allusion was improper; and where the record on appeal does not disclose what was said by counsel, nor who said it, the Supreme court can not presume that what was said was said by appellant's counsel, or was properly said by them, or that the appellant was injured by such instruction. *Ib.*
9. *Objection to Evidence.—Appeal.*—Where parol evidence is admitted on the trial, and no objection is there made, the question of its competency can not be presented on appeal. *Holderbaugh v. Turpin*, 84
10. *Instructions not Applicable to Evidence.—Supreme Court.*—It is error to give instructions which have no application to the evidence. When given, the Supreme Court can not say that such instructions did not tend to mislead and confuse the jury, to the injury of the losing party. *Nicklaus v. Burns*, 93
11. *Default Set Aside.—Trial Granted.—Finding and Judgment in Favor of Defaulting Party.—Former Judgment not Reinstated for Technical Defect.*—Where a defendant appeared by attorney and filed a sworn plea, but failed to appear on the day set for trial, and his attorney withdrew his appearance and permitted judgment to be entered by default, and within four days thereafter defendant appeared and had the default set aside, and upon trial of the action prevailed, the Supreme Court can not say that the trial court erred in granting the trial for the excuse given by the defendant, nor will it, on a technical defect in the showing, order the original judgment reinstated. *Comstock v Whitworth*, 129
12. *Instruction.—Statement of True Issue.*—Where an instruction, taken in connection with others given, fairly and clearly stated the true, if not the technical, issue between the parties, it will not be regarded by the Supreme Court as error. *Ib.*
13. *Instruction.—Assuming Facts.—Corroborating Evidence in Support of Witness.—Weight of Evidence.—Province of Jury.*—An instruction which states that there is a conflict in the evidence, and undertakes to give a summary of the testimony, is calculated to produce an impression on the minds of the jury unjust to one party or the other; and if it affirm, or even assume, that credit must be given to the witness who is best, or apparently best, supported by corroborating evidence, without the qualification that they are the exclusive judges of the weight of evidence, the credibility of the witnesses, and the inferences of fact to be drawn from the proofs, it is erroneous. *Ib.*

14. *Same.—Interrogatories by Each Party.—Answers Inconsistent with Each Other.—Discharge of Jury Without Objection and Motion for Venire de Novo.*—Where interrogatories were put by the court at the request of plaintiffs, and others at the request of the defendants, and the jury returned a general verdict for the defendants, with answers to all the interrogatories, and no objection was made to the form of either, or to the sufficiency of the answers, and the plaintiffs, without a motion for a *venire de novo*, moved “for a judgment in their favor, upon their cause of action, upon the answers of the jury to said interrogatories propounded by plaintiffs, notwithstanding the general verdict,” it was not error for the court to overrule their motion and refuse to render judgment for the plaintiffs upon the answers to their interrogatories, the sets of answers being manifestly inconsistent, each with the other. *Byram v. Galbraith*, 134
15. *Same.—New Trial.—Inconsistencies and Contradictions in Special Finding.—Supreme Court.—Evidence.*—In such case, in the absence of the evidence from the record, the Supreme Court must hold the general verdict right, unless the answers to all the interrogatories clearly show it was wrong. Inconsistencies and contradictions in such answers are not grounds for a new trial. *Ib.*
16. *Default.—Motion to Relieve from Judgment.—Excusable Negligence, When not Shown.*—A motion to set aside a default and relieve from a judgment, under section 99, 2 R. S. 1876, p. 82, showing by affidavits that the default was taken November 6th, 1878, and that, on the fourth and fifth days of that month, the party and counsel had answers ready to be filed on call of the cause, but making no reference to the sixth, when the default was entered and the judgment was rendered, does not make a case of “excusable neglect.” *Bash v. Van Osdol*, 186
17. *Same.—Amendment of Complaint After Default and Judgment.*—In such case, after default and judgment on a statutory arbitration bond, it was error for the court to permit the plaintiffs to amend their complaint by inserting the amount for which the award was confirmed and judgment thereon rendered. *Ib.*
18. *Defaulted Defendant.—Damages.—Right to Trial and Exceptions.*—A defaulted defendant can not controvert anything except damages. He may demand a trial by jury, cross-examine plaintiff's witnesses, introduce evidence in mitigation, ask instructions as to the measure of damages, move for a new trial, and reserve exceptions. *Ib.*
19. *Pleading not Subscribed.—Demurrer.—Form.—Substance.—Motion to Reject or Strike Out.*—Every pleading, in a court of record, must be subscribed by the party or his attorney; but an objection to a pleading, that it is not thus subscribed, can not be reached by a demurrer for the want of sufficient facts. Such an objection goes to the form, and not the substance, and can be reached only by a motion to reject or strike out the pleading. *Lentz v. Martin*, 228
20. *Blanks in Pleading.—Motion to Make More Certain and Specific.*—An objection to a pleading, on account of blanks, can not be reached by demurrer, but by a motion for an order requiring the party to make his pleading more certain and specific. *Ib.*
21. *Written Instrument Part of Pleading.*—The statement in a pleading founded upon a written instrument, “a copy of which is filed herewith,” is sufficient to make the copy following the pleading a part thereof. *Ib.*
22. *Same.—Variance.—Copy Controls.*—In such case, if there is a variance between the description of the instrument and the copy therewith filed, the copy controls, and will be presumed to be right until the contrary appears. *Ib.*

23. *Venire de Novo.—Verdict.—Plaintiffs or Defendants.—Cross Complaint.—Original Complaint.*—A party plaintiff is not entitled to a *venire de novo* because the general verdict is: "We, the jury, find for the defendants on the plaintiff's complaint, and for the defendants on the cross complaint." Technically, defendants filing a cross complaint, are plaintiffs therein; but there is no impropriety in designating them as defendants, to distinguish them from the plaintiffs in the original complaint. *Ib.*
24. *Complaint.—Several Demurrer.—Form.*—A demurrer, "The defendants herein demur to each of the paragraphs of the complaint, for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action," accords substantially with the form approved for a several demurrer, and is sufficient. *Stone v. State*, 235
25. *Construction of Code.*—The code of practice requires a liberal construction, with a view to substantial justice. *Ib.*
26. *Verdict.—Court may Direct.*—There are cases where the court may rightfully direct a verdict. *Weis v. City of Madison*, 241
27. *Verdict Against Law and Evidence.*—A judge is not bound to submit a question to a jury, where their verdict, if contrary to his views of the evidence and its legal effect, would be certainly set aside as clearly against the law and the evidence. *Ib.*
28. Courts interfere only in cases where it is manifest that there is no evidence upon which a verdict could legally rest. *Ib.*
29. *Exception.—Leave to State in Writing.*—An exception must be reduced to writing when taken, or leave must be obtained to afterward state it in writing. *Ib.*
30. A plaintiff can not state one cause of action and recover upon another. *Ib.*
31. *Pleading.—Demurrer to Evidence.—Pleading Definite and Unequivocal.—Proof Indefinite and Equivocal.*—A pleading must be definite and unequivocal, but the proof necessary to support the plea, especially upon a demurrer to the evidence, may be both equivocal and indefinite, and yet be deemed sufficient. *Lemmon v. Whitman*, 318
32. *Application to Set Aside Judgment.—Demurrer.*—Where a demurrer was filed to a complaint, under section 99, 2 R. S. 1876, p. 82, to set aside a judgment, and on the hearing the court announced that "The submission of the demurrer was and must be regarded as a full submission of the cause upon the facts stated in the motion," and this announcement was "acquiesced in by the parties," the plaintiff on appeal can not complain of the ruling of the trial court so announced. *Slagle v. Bodmer*, 330
33. *Same.—Final Judgment.*—In such case, where the evidence is agreed to upon submission of the demurrer, the party demurring is entitled to final judgment, on a decision in his favor. *Ib.*
34. *Same.—Filing Amended Complaint.*—In such case, a motion of the plaintiff for leave to file an amended complaint was correctly overruled. A party can not amend after a final decision against him. *Ib.*
35. *Illness of Defendant's Wife.—Residence Remote from County Seat.—Default.—Excusable Neglect.*—Under section 99, 2 R. S. 1878, p. 82, an excuse for not giving his case attention, that the defendant was detained at home, sixteen miles from the county seat, by the serious illness of his wife, is sufficient; and he can not be justly charged with inexcusable neglect if he suffers a default because of his failure for such cause to appear at the time the cause was set for trial. *Ib.*

36. *Same.—Meritorious Defence.—Pleading.*—In addition to showing a reasonable excuse, the party must show that there is a meritorious and valid defence to the action. It is not sufficient to aver, in general terms, that the defendant has a meritorious defence. The facts constituting the defence must be fully stated, in order that the court may judge whether there is, or is not, a meritorious defence. *Ib.*
37. *Demurrer in Law and to Agreed Evidence.—Exhibits.—Complaint.*—Where a case was submitted upon demurrer, with an agreement, by acquiescence, that the facts be taken as true, exhibits accompanying the complaint constituted matters of agreed evidence, although not proper as matters of pleading, and the complaint itself, by agreement of the parties, was at once a pleading and an instrument of evidence. *Ib.*
38. *Same.—Bill of Exceptions.*—In such case, the verified complaint need not be incorporated in a bill of exceptions to become a part of the record, and a reference to it in the bill shows plainly that it was acted upon as both pleading and evidence already in the record. *Woods, J., dissents.* *Ib.*
39. *Ruling on Demurrer.—Answer.—Cases Disapproved.*—A defendant is not harmed by a ruling sustaining a demurrer to a paragraph of answer, although good, if he has another paragraph under which the same matters are admissible in evidence; but it is otherwise where a plaintiff's demurrer to a bad answer is overruled. *Jordan v. D'Heur*, 71 Ind. 199; *Thomas v. Hamilton*, 71 Ind. 277, *Webster v. Bebinger*, 70 Ind. 9; *DeArmond v. Stoneman*, 63 Ind. 386; and *McGee v. Robbins*, 58 Ind. 463, intimating or sanctioning a different doctrine, disapproved. *Over v. Shannon*, 352
40. *General Finding.—Facts Proved.*—A general finding for the plaintiff is a finding that every fact necessary to a recovery by him is proved. *Early v. Hamilton*, 376
41. *Excluding Answer.*—In an action originating before a justice of the peace, it is not error to exclude the filing of an answer setting up a defence which is provable without plea. *Lawless v. Harrington*, 379
42. *Cross Complaint.*—After trial without objection, although no answer was filed to a cross complaint, it will be regarded on appeal as if an answer in denial had been filed. *Lewis v. Bortsfield*, 390
43. *Same.—Appearance. Service.—Default.—Judgment.*—It is only where one of two or more defendants, after personal service, makes default in the original action, and another defendant files a cross complaint, setting up new matter not apparent in the original complaint, that the defaulting defendant must be served with process, issued on such cross complaint, before any judgment by default can be rendered against him thereon. *Ib.*
44. *Summons.—Return Day.—How Ten Days' Service is Counted.—Statute Construed.*—Under section 315 of the civil code, as amended by the act of March 6th, 1877, Acts 1877, p. 105, the ten days' service of a summons on a defendant is counted by excluding the day of service and including the return day. Service on the 9th day of June for the 19th was good ten days' service. *Monroe v. Paddock*, 422
45. *Same.—Setting Aside Default.—Excusable Neglect.*—Where court met and entered default and judgment at 8 o'clock in the morning of the return day, and, by affidavit submitted the same day, the defendants showed that they lived eleven miles distant, had no public conveyance, travelled by private conveyance, reached the court-house at 9 o'clock, and employed counsel, and set forth therein a good and legal defence to the whole of plaintiff's claim, the trial court erred in over-

ruling their motion to set aside the default and permit them to answer the complaint. Such neglect may well be regarded as excusable neglect, under section 99, 2 R. S. 1876, p. 82. *Ib.*

46. *Pleading.—Bad Answer.—Overruling Demurrer.—Error.—Judgment Must Appear to be on Good Paragraph.*—Overruling a demurrer to a bad paragraph of answer adjudges that proof of the facts is sufficient to bar the action, and is substantial error, when it does not affirmatively appear that the judgment was not rendered on the paragraph in question. *Conyers v. Mericles, 443*

PRESUMPTION.

See CRIMINAL LAW, 26; GRAVEL ROAD, 3; JURISDICTION, 1; NEGLIGENCE, 4; PARTITION, 3; PRACTICE, 8; PROMISSORY NOTE, 2, 41; RAILROAD, 4, 5; SLANDER, 4; SPECIAL VERDICT, 2; SUPREME COURT, 9, 22 to 25; TRESPASS, 4; VENDOR AND PURCHASER, 4.

PRINCIPAL AND AGENT.

See AGENCY; CITIES AND TOWNS, 5; ESTOPPEL, 2; PARTNERSHIP, 8.

PRINCIPAL AND SURETY.

See COMPOSITION BOND; DECEASED'S ESTATES, 14; PROMISSORY NOTE, 15, 16, 20, 38, 41, 43; TOWNSHIP TRUSTEE, 7; TRUSTS AND TRUSTEE, 7.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION, 3, 4.

PROMISSORY NOTE.

See DECEASED'S ESTATES, 11, 23; MORTGAGE, 6; PARTNERSHIP, 1, 2; PLEADING, 8; TOWNSHIP TRUSTEE, 3, 5; VENDOR AND PURCHASER, 1 to 4.

1. *Right of Holder to Collect.*—The possession of a promissory note by a reputable person, other than the payee, is *prima facie* evidence of the authority of such person to collect it, whether it is endorsed by the payee or not. *Paulman v. Claycomb, 64*
2. *Same.—Evidence.—Presumption.—Practice.*—Where the evidence for and against the authority of the holder of a promissory note to receive payment is equally balanced, the presumption arising from the possession thereof is sufficient to furnish a preponderance in favor of the authority of such holder to receive payment. *Ib.*
3. *Insurance Policy.—Charter.—Premium Note Payable in Instalments.—Demand of Instalments not Due.—Complaint.—Averments Struck Out.*—In an action by an insurance company upon a premium note, absolute on its face, payable in annual instalments, seeking to recover for all instalments for a failure to pay the first, by a reference to the policy and a provision in the charter, it is not error to sustain the defendant's motion to strike out of the complaint all averments seeking to show that all the instalments of the note subsequent to the first had matured upon failure to pay it for more than thirty days after notice. *American Ins. Co. v. Gallahan, 168*
4. *Same.—Consideration.—Policy and Charter not Made Parts of Note.*—The statement in such note, that its consideration was a policy of insurance, did not change its legal effect, nor make such policy a part of the note, much less the charter. *Ib.*
5. *Same.—Written Agreement.—Verbal Understanding.*—A written agreement can not be controlled by a contemporaneous verbal understanding of the parties inconsistent with it. *Ib.*
6. *Same.—In such case, the agreement that the rights of the parties were to be determined, not by the note itself, but by the plaintiff's charter, was a verbal agreement that varied the terms of the note and, therefore, inoperative.* *Ib.*

7. *Pleading.—Complaint.—Promissory Note.—Reference to Copy of Endorsement Sued On.—Demurrer.*—In an action by the holder of a promissory note against one as endorser, a complaint containing no reference to the copy of the endorsement filed, is insufficient on demurrer. Without such reference, the court could not know that it was a copy of the endorsement sued upon. *Williams v. Osbon*, 280 *Ib.*
8. *Special Finding.—Burden of Proof.—Endorsement.*—On trial of an action against one as endorser, the burden of proof is on the plaintiff suing as endorsee, and, if the evidence fails to establish the fact of endorsement, the finding should be against him. Unless it was found for him, it will be regarded by the Supreme Court as found against him. *Ib.*
9. *Same.—“Assigned.”—“Endorsed.”*—In such case, a finding “that, prior to the maturity of said notes, said” defendant “assigned said notes, in writing, to the defendant” N., is not a finding that he “endorsed” the notes to him. *Ib.*
10. *Same.*—An averment that a note was “assigned in writing” is not equivalent to an averment that it was “endorsed”; and a finding that it was “assigned in writing” is not a finding that it was “endorsed.” *Ib.*
11. *Same.—Meaning of “Endorsement.”*—Endorsement implies a transfer by a writing upon the instrument. “Assigned” implies that the assignment was made upon a separate instrument. *Ib.*
12. *Same.—“Assignment” Negatives “Endorsement.”*—A finding that notes were assigned negatives an endorsement, and the assignment creates no liability, for by it the assignor does not warrant the solvency of the maker. *Ib.*
13. *Insolvency of Maker.—Householder.—Exemption.—Execution.—Endorser.—Endorsee.*—An endorsee is not bound to first sue the maker of a promissory note, unless the latter has property out of which he can enforce payment of some part of the debt, and if the maker is a resident householder when the note matures, and has not then, or afterward, more than the three (or six) hundred dollars' worth of property exempt from execution, he is insolvent within the meaning of the law. *Ib.*
14. *Same.*—As between the endorsee and the endorser, the property of the maker, not exceeding the amount exempt by law, must be regarded as beyond the reach of an execution. *Ib.*
15. *Pleading.—Cross Complaint.—Sureties.—Partners Retiring.—Partners Remaining.—Several Demurrs.*—In an action upon a promissory note of a partnership against the members thereof and their successors and representatives, but asking judgment against the members alone, a cross complaint of two defendants, alleging that when they withdrew their co-partners assumed and agreed to pay the debts of the firm, including the note sued on, is sufficient to show that the partners remaining became primarily liable, and that, as between them and the retiring partners, the latter must be regarded as the sureties of the former; but the remaining partners, by sale, by death, by assignment and otherwise, being represented in the action by successors, administrators, trustees and receivers, the cause of action on the note was not against the latter, and their several demurrs to the cross complaint of the retiring partners against them were correctly sustained. *Williams v. Boyd*, 286
16. *Same.—Release of Surety.—Extending Time of Payment.—Usurious Interest.—Verbal Agreement.—Evidence.*—Where, on trial of such action, the note in evidence showed an agreement to pay ten per cent. interest, not in advance, evidence that when two partners retired the continuing partners agreed to pay the note, that the payee had notice of

that arrangement, that interest was paid for a time at twelve per cent., that by an agreement, not in writing, it was paid at ten per cent. for two years, and interest on interest was paid at that rate, a valid agreement to extend the time of payment so as to discharge the sureties was not proved. *Ib.*

17. *Verbal Agreement.—Interest.*—A verbal agreement to pay ten per cent. interest in advance upon a note bearing interest at ten per cent. not in advance is usurious, and would not have the effect to extend the time for the payment of the note. The holder may maintain an action upon it the day after making the contract. *Ib.*
18. *Same.—Evidence.—Promise of Surety with Knowledge of Release.*—Evidence of a promise of the surety to pay the note, made with knowledge of all the facts, is admissible; and, though he had been released by an extension of the time for payment of the note, his promise would be binding upon him. *Ib.*
19. *Damages.—Attorney's Fees.—Evidence.*—Evidence, "I am an attorney at law; on \$3,300 I think reasonable attorney fees would be \$150," admitted without objection, is proof sufficient to justify a finding of the court for \$108.10 as attorney's fees. *Ib.*
20. *Sureties.—Agreement with Principal.—Extension of Time.—Demurrer to Evidence.—Valid Contract.—Discharge.*—Where, upon trial of an action upon a promissory note, dated July 5th, 1871, payable in one year, with interest at ten per cent. after maturity until paid, two defendants gave evidence tending to prove a plea that they executed the note as sureties only, which the payee knew, and that the time for payment had been extended by an agreement between the payee and the principal debtor, without their consent, and the plaintiff's demurrer to defendant's evidence was overruled, the Supreme Court, being satisfied from the evidence that a valid and binding contract for an extension of time had been made, without the consent of the sureties and upon an executed consideration, affirmed the judgment. *Lemmon v. Whitman, 318*
21. *Same.—Interest at Ten Per Cent. Contracted for.—Interest Paid at Twelve Per Cent.*—In such case, evidence that the note included interest for one year in advance at ten (or twelve) per cent., that in July, 1873, interest at ten per cent. for the year then past, and fifty dollars additional for one year's forbearance, were paid, that, in July, 1874, and July, 1875, each, a like payment was made, and forbearance contracted for, all without the consent of the sureties, shows a valid and binding contract for an extension of time, which operated to release the sureties, and sustained their plea. *Ib.*
22. *Recoupment.—Usurious Interest.—Lawful Interest.*—The rule of recoupment is to credit the amount of the payment of usurious interest at the date of payment, thus paying the accumulated lawful interest or cutting down the principal. *Ib.*
23. *Consideration for Extension.*—The payment of usurious interest for a time already elapsed, on a note or other obligation to pay money, constitutes a good consideration for an agreement to extend the time of payment, though under the law the debtor or his sureties, if they choose, may recoup the amount so paid. *Ib.*
24. *Taint of Usury.—Borrower may, but Lender may not, Plead Usury.—Voidable Contract.*—The borrower may set up usury for the purpose of avoiding a contract tainted with it, but the lender can not. Such a contract is not absolutely void, but voidable only on account of the usurious taint, and that not at the option of the lender, but of the debtor. *Ib.*
25. *Rescission and Recoupment.—Restoration by Creditor will not avoid Contract for Extension.*—The right of rescission and recoupment is per-

- sonal to the debtor, his heirs, representatives or sureties. The creditor who has received the usury has no right to restore it or credit it on the debt, and thereby release himself from his engagement to give time, especially after the stipulated time has gone by, on the ground that his agreement was without sufficient consideration. *Ib.*
26. *Contract.—Reference to Conditions in Other Writings.—Pleading.—Complaint.—Copy.*—A complaint upon a promissory note or other written obligation, “payable according to the conditions” in other written instruments, forming a part of the contract, must set out not only a copy of the note or obligation sued on, but also copies of the instruments referred to. *Busch v. Columbia City Building, etc., Association*, 348
27. *Contract of Assignor.*—The contract of an assignor of a promissory note, negotiable under the statute, but not governed by the law merchant, is a warranty that the maker is liable on the note and able to pay it. *Ward v. Haggard*, 381
28. *Judgment.*—After judgment upon a promissory note, it can not be endorsed or assigned. *Ib.*
29. *Assignment.—Liability of Endorsers of Note to Assignee of Judgment.—Statute Construed.*—The mere assignment of the judgment obtained by an assignee, against the makers, of a promissory note, negotiable under the statute, does not transfer to the assignee of such judgment the cause of action, theretofore existing, against the endorsers, upon their endorsement to the assignee of the note on which the judgment was rendered. The cause of action to pursue remote endorsers, under the statute, 1 R. S. 1876, p. 635, is given to the assignee of the note itself, and not to the assignee of the judgment on the note. *Ib.*
30. *Consideration.—Satisfaction of Mortgage.—Agreement to Surrender or Settlement.—Evidence.*—Where a mortgagor, to procure a release and satisfaction of the mortgage, and thereby secure a needed loan and save himself from financial ruin, executed the note sued on upon the agreement of his mortgagee, the payee, that if, upon settlement, it appeared that the mortgage note had in fact been paid as by him claimed, he would surrender it, the trial court erred in excluding evidence offered by the defendant, tending to prove that the mortgage note had been fully paid before the note sued on was given, and that the latter was without consideration. *Smith v. Boruff*, 412
31. *Consideration.—Inquiry.—Parol Evidence.*—The consideration of a written contract is open to inquiry, and the consideration of a promissory note, or the want of it, may be shown by parol evidence. *Ib.*
32. *Same.*—The surrender of a satisfied note and the cancellation of a mortgage given to secure it are not alone sufficient considerations to support a new note for a sum claimed to be due on the old note. *Ib.*
33. *Promise of Party Legally Bound.*—Where a party is legally bound to do a thing, as to enter satisfaction of a mortgage when payment has been made, a promise made to induce him to do it is without consideration. *Ib.*
34. *Agreement.—Consideration.—Evidence.*—Evidence that, at the time a new note was executed, the parties reserved the right to inquire into its consideration, is proper. *Ib.*
35. *Compromise.—Executory Contract.—Colorable Ground.*—There must be at least a colorable ground of a claim, in law or in fact, to sustain an executory contract, given as a compromise of it. *Ib.*
36. *Payments.*—A creditor can not, by denying payments he has received, create a controversy which will support a promise by his debtor to pay him again, in whole or in part, as the price of doing that which law and equity require him to do without further compensation. *Ib.*

37. *Defence.—Alteration.*—In an action on promissory notes, a defence that, since the execution by the defendants of the notes sued on, the notes had been materially altered, and that they never executed them as they appeared, constituted a good defence. *Monroe v. Paddock*, 422
38. *Principal and Surety.—Extension of Time.—Joint Makers.—Suretyship Unknown to Payee.—Release.*—An agreement between the payee and one of two joint makers of a note, without the knowledge or consent of the other, a surety in fact but not known as such to the payee, does not have the effect to release the non-consenting maker. *Hall v. Hall*, 34 Ind. 314, distinguished. *Mullendore v. Wertz*, 431
39. *Same.*—The mere giving of time to one of two joint obligors whose obligations are equal will not discharge the other. *Ib.*
40. *Oral Agreement.—Covenant not to Sue.*—Giving time by oral agreement can not have any greater effect than a covenant by a creditor not to sue for a specified time one of two or more joint debtors. Such a covenant is not a release and furnishes no defence to the other debtor. *Ib.*
41. *Suretyship.—Presumption.*—Knowledge of suretyship is not presumed in favor of the sureties, but must be proved. *Ib.*
42. *Covenant.*—A covenant with one joint debtor not to sue is a mere personal covenant. *Ib.*
43. *Surrender of Old Note for New.—Maker a Principal.*—Where an heir, at the request of one of two joint makers, received their note as a part of his distributive share of the estate to which it belonged, and surrendered it for their new note for the amount of the old, as between himself and the payee, such maker became a principal. *Ib.*
44. *Same.—Answer of Release.—Reply.*—In an action upon the new note, such facts constitute a good reply to an answer of discharge by extension of time of payment orally given his co-obligor in both notes. *Ib.*
45. *Same.—Evidence.—Receipt of Heir to Administrator.*—On trial of such action, the court did not err in admitting in evidence the receipt of the heir, accompanied by testimony of the administrator explaining its execution and its terms, and that the amount included the old note. *Ib.*

PROSECUTING ATTORNEY.

1. *Criminal Courts.—Marion Criminal Circuit Court.—Statute Construed.—Constitutional Law.*—Under sections 7 and 8 of "An Act concerning Criminal Courts," Acts 1881, p. 111, the Marion Criminal Circuit Court became the Criminal Court of Marion county, organized under section 1, and its prosecuting attorney, on September 19th, 1881, continued in office, and will continue to be the prosecuting attorney thereof, under section 3, article 15, of the constitution, until his successor shall have been elected and qualified. *Elam v. State, ex rel.*, 518
2. *Same.—Successor's Election.—Nineteenth Judicial Circuit.*—In such court the successor will be the prosecuting attorney of the Nineteenth Judicial Circuit, elected and qualified after the act took effect. *Ib.*
3. *Same.—Elected Before April 12th, 1881.*—T., who was elected and qualified as such prosecuting attorney before the enactment of the act approved April 12th, 1881, did not become the successor of E., who had been elected in 1878, and was holding September 19th, 1881, beyond his term of two years, because of the failure of the electors of Marion county to elect, or vote for, his successor in October, 1880. *Ib.*
4. *Quo Warranto.—Pleading.—Information.—Answer.—Demurrer.—Practice.*—Where an information shows that the relator has no interest in the office in controversy, or its salary, fees and emoluments, and that the incumbent is lawfully in possession, his demurrer to the answer, reciting the same facts in substance, should not only be overruled, but, as it searches the record, should be carried back and sustained to the information. *Ib.*

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RAILROAD.

See NEGLIGENCE; TRESPASS, 5.

1. *Killing Stock.*—*Burden of Proof.*—In an action against a railroad company for killing stock upon the track of its road, at a place where the road was not fenced, the burden of proof that the road was not fenced at the place of the killing, or at the place of the entry of the animals upon the track, is on the plaintiff; but that it was not the company's duty to fence at such place, was matter of defence.

I., P. & C. R. R. Co. v. Lindley, 426

2. *Same.*—*Evidence.*—*Fence.*—*Street.*—Where, in such case, the evidence shows that the stock was killed between two streets of a city, on the track of the defendant's railroad, not fenced, where a fence might have been built without interfering with any street or alley, or with the customary operations of the road, the company is liable. *Ib.*

3. *Speed of Trains.*—*Negligence.*—*Instruction.*—On trial of an action against a railroad company for injuries to the plaintiff, while riding as a passenger in a car of defendant's train, which was thrown from the track by a broken rail, or the breaking of a rail, an instruction undertaking to define a safe rate of speed by its comparison with the velocity "practiced before, with the tacit consent of the community, and without accident," assumed a false criterion, and was erroneous.

C., C., C. & I. R. W. Co. v. Newell, 542

4. *Same.*—*Broken Rail.*—*Presumption.*—*Instruction.*—*Burden of Proof.*—On such trial, it was error to instruct that "There is no presumption that the rail was broken before this train reached it, and, if the plaintiff claims that it was, the burden of proof is upon him." *Ib.*

5. *Same.*—*Negligence.*—In such case, a *prima facie* presumption of negligence arises against the railroad company, to be overcome by proof. *Ib.*

6. *Same.*—*Speed.*—The usual practice for a considerable period would tend to prove what speed on a road is possible, with reasonable safety. *Ib.*

7. *Same.*—*Query.*—When a rail has been cracked, or broken, by a passing train, is not the company guilty of negligence in not causing it to be examined and repaired before the passage of another train? *Ib.*

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See ATTACHMENT, 2; CONTRACT, 2; CONVEYANCE; SHERIFF'S SALE, 1; TAX TITLE, 4; TRUSTS AND TRUSTEE; VENDOR AND PURCHASER.

REAL ESTATE, ACTION TO RECOVER.

See JUDGMENT, 3; MORTGAGE, 10; PARTITION, 1.

1. *Practice.*—*Venire de Novo.*—*Verdict.*—*Disclaimer.*—*Remittitur.*—Where, in an action for the possession of an island, one of the two defendants entered a disclaimer before trial, and the verdict was that both defendants "are the owners in fee simple of the land described in plaintiff's complaint," and they entered a remittitur as to the lands, except that part described in their cross complaint seeking to quiet their title, no such uncertainty appears in the verdict as required a *venire de novo*. *Bonewits v. Wygant, 41*

2. *Same.*—*Surveyor's Record and Testimony.*—On trial of such action, it was not error to permit the introduction in evidence of the county surveyor's record containing his survey of the island sued for, under

direction of the Surveyor General of the United States, and testimony of the surveyor that his plat and notes were correct, even if the record was not signed by the surveyor. *Ib.*

3. *Same.*—*Transcript of Land Records by Auditor of State.*—*Evidence.*—On such trial, a transcript of the survey and field notes of the island among the records in the land department of the State, properly authenticated by the Auditor of State, was correctly admitted in evidence. *Ib.*
4. *Same.*—*Riparian Rights.*—*Island in Wabash River.*—*Adverse Possession of Twenty Years.*—*Survey and Sale by United States.*—*Title of Purchasers Quieted.*—In an action to recover possession of an island in the Wabash river, claimed by the owner of the adjacent land south, under riparian rights, as an accretion by reason of the partial filling up of the channel on his side of the thread of the stream, evidence that defendants were in continuous adverse possession more than twenty years before the commencement of the suit, and had purchased of the United States in 1857, after a survey ordered in 1849, and made in 1850; that when plaintiff purchased the island, in 1837, it had been omitted from the original survey, except to designate its location, and that he never had possession or exercised acts of ownership over the same, or asserted title thereto before this action, a verdict for the defendants is sustained by the evidence and supported by the law. *Ib.*
5. *Practice.*—*Pleading.*—*Answer.*—*Demurrer.*—A defendant in an action for the recovery of real estate may give in evidence all defences under the general denial; but he may also plead specially, and when he does, and his answers are bad, it is error to overrule a demurrer to them. *Over v. Shannon*, 352
6. *Pleading.*—*Answer.*—*Exemption.*—*Title to Property.*—In an action to recover possession of real estate, an answer of the defendant, alleging that he had claimed the property as exempt from sale on execution, and that the sheriff had wrongfully refused to allow his claim, but failing to allege that he had any title to such real estate, or any facts from which such an inference could be drawn, is insufficient on demurrer. *Ib.*
7. *Same.*—*Pleading.*—*Property Exempt from Sale on Execution.*—In such action, a paragraph of answer setting up that the property was exempt from execution, and wrongfully sold by the sheriff to the plaintiff, but failing to show that the defendant took the steps required by law to secure the exemption of the property, is insufficient; and the allegation, that "the defendant filed with the sheriff a schedule of his property," is not sufficient to show the filing of such a schedule as the law requires. *Ib.*
8. *Title.*—One seeking to recover possession of real estate must recover upon the strength of his own title. *Brandenburg v. Seigfried*, 568
9. *Same.*—*What Constitutes Good Title.*—The title to real estate, in order to be good, must be traceable to the United States, or to a grantor in possession under claim of title. *Ib.*
10. *Same.*—*Failure of Proof.*—On trial of an action for possession of real estate, by the widow and other heirs of B., who died intestate, an entire failure of proof that M., from whom B.'s title is claimed to have come, entered the land, had possession, or that his grantee, S., had possession, and of the contents, tenor, delivery and continued possession of the deed of S. to B., or to B. and wife jointly, and a conflict of evidence as to its execution, justified a finding for the defendants. *Ib.*
11. *Same.*—*Deed of Wife.*—*Coverture.*—*Estopel.*—In such case, the defendants, having accepted a deed from the wife alone, and having put it in evidence, were not thereby estopped from disputing her title. *Ib.*

12. *Absolute Deed as Mortgage.—Grantee of One not Grantee of Mortgagee.—Surrender of Possession.*—On trial of an action to recover possession of real estate, the court erred in its conclusion of law against the plaintiff, where the special finding of facts showed that plaintiff, having a perfect title to land, conveyed it by deed, absolute in form, to secure one to whom he was indebted, and who was also indorser for him, and, while absent from the State, one P. took possession of the land, having no deed therefor from the grantee, and sold it and gave possession to the defendant, who erected a dwelling-house and made other improvements on the land, without the knowledge of the plaintiff, no surrender of possession by the plaintiff being shown, or inferable, from the facts found. *Parker v. Hubble, 580*
13. *Same.—Deed Treated as Mortgage.—Defendant May not Dispute its Character.*—In such case, the deed was in effect only a mortgage, and the defendant, not claiming title under any conveyance or purchase from plaintiff's grantee, can not dispute the character of the instrument. *Ib.*
14. *Same.—Mortgagor May Reclaim.—Previous Payment or Discharge of Mortgage not Necessary.*—A mortgagor, by deed absolute in form, with parol agreement to reconvey, may reclaim and recover possession of the land from one not a grantee of the mortgagee, without having paid or discharged the mortgage. *Smith v. Parks, 22 Ind. 59*, and *Wheeler v. Ruston, 19 Ind. 334*, distinguished. *Ib.*
15. *Same.—Burden of Proof.*—In such case, the burden of proof is on the defendant to show that the plaintiff parted with his possession to the mortgagee by an agreement in writing, or by parol, effectually executed by actual delivery of possession. *Ib.*

REASONABLE DOUBT.

See CRIMINAL LAW, 4 to 6, 35.

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See CHATTEL MORTGAGE, 1; EXECUTION, 2; PARTNERSHIP, 3.

1. *Trespassing Animals.—Enclosed Land.—Lawful Fence.*—An action of replevin will lie to recover cattle seized and held for the payment of damages done by them to crops upon enclosed land, if the fence through which they broke was not a lawful fence. *Clark v. Stipp, 114*

2. *Same.—Evidence.—Supreme Court.*—If, in such case, the evidence is conflicting as to whether it was a lawful fence, and the lower court finds for the plaintiff, the Supreme Court will regard the fact established, that the fence was not a lawful fence, within the meaning of sections 1 and 2, 1 R. S. 1876, p. 495. *Ib.*
3. *Same.—Practice.—Remedy.*—If the fence is not a lawful one, the taker-up has no right to detain such cattle, and the owner can not be deprived of any remedy he may have, simply because the taker-up claims them as trespassing animals. *Ib.*
4. *Same.—Act of 1877 Construed.—Board of Commissioners.*—The act of March 12th, 1877, Acts 1877, Spec. Sess., p. 42, authorizes an action to be maintained against the owner of all trespassing animals, whether the fence is a lawful one or not, unless the animals are authorized to run at large by an order of the board of commissioners, in which case the fence must be lawful to maintain the action. *Ib.*
5. *Same.*—In such case, it is immaterial whether the order was passed before or after the said act of 1877 took effect. *Ib.*
6. *Answer.—Fraudulent Transfer of Personal Property.—Execution.—Fraud.*—In an action for the recovery of personal property, a paragraph of answer averred that the property was fraudulently transferred to the plaintiff, for the purpose of defeating the collection of a judgment against the former owners thereof, and that the defendants have possession of the property by virtue of a writ of execution issued on such judgment.
Held, that the real defence presented by the answer is property in a third person, and, as evidence thereof was admissible under the general denial pleaded, no error was committed in striking out the answer.
Held, also, that the plaintiff could only recover upon the strength of his own title, and, if that grew out of fraud and collusion between him and his vendors, his action must fail. *Lane v. Sparks*, 278
7. *Nominal Damages.*—In an action for the recovery of personal property under section 128 of the code, where it is shown that the property was wrongfully taken and unlawfully detained, the plaintiff is entitled to recover nominal damages without proof of actual damages. *Robinson v. Shatzley*, 461
8. *Same.—Proof of Detention of Property.*—It is not necessary, in order to maintain such action, for the plaintiff to prove that the property was detained by the defendant in the county where the action is brought. Such proof, if necessary in any case, is only required where the immediate possession of the property is demanded. *Ib.*
9. *Same.—Demand.*—Where it is alleged and proved that the property was unlawfully taken and unlawfully detained, no demand before suit is necessary. *Ib.*
10. *Action to Recover Possession.—Bill of Sale.—Demand.—Evidence.*—A demand for possession of personal property claimed under a bill of sale is sufficiently proved by evidence of the agent making the demand, and of the defendant, that it was his first knowledge of plaintiff's claim of ownership before action brought to recover its possession. *Schenck v. Sithoff*, 485
11. *Same.—Bill of Sale.—Consideration.—Instruction.—Gift.*—On trial of an action to recover possession of such personal property, an instruction, asked and refused, that, "If the jury shall find that the bill of sale was made without any actual consideration as between them, the plaintiff is not entitled to recover the possession of the property described in the bill of sale," was not fully correct: In such case, if the bill of sale was without consideration, evidence having been introduced tending to show a perfect gift, by delivery of possession under it, to the plaintiff, an action would lie to recover possession. *Ib.*

12. *Same.—Consideration.—Payment.*—In such case, an instruction, assuming that the price mentioned in the bill of sale was the true consideration, was wrong, and correctly refused. It was competent to show a different consideration, and that it had been paid before the making of the bill of sale. *Ib.*
13. *Same.—Agreement of Mortgagor to Permit Foreclosure.*—An agreement by the plaintiff, who was a mortgagor of land, to permit a foreclosure of the mortgage, and the accomplishment of such foreclosure, constitute a sufficient consideration to support the bill of sale in suit made by the defendant, who was the mortgagee, to the plaintiff. *Ib.*
14. *Same.*—In such case, the mortgagor had the right, by payment, to prevent a foreclosure; and, having yielded that right and the right of redemption, the plaintiff, in effect, agreed that the title should pass to the mortgagee as if a deed had been bargained for and made. *Ib.*
15. *Same.—Valid Sale while Under Levy.*—The owner of property under the levy of executions may sell it, and, when they are satisfied, the sale, if otherwise valid, is good against the world. *Ib.*
16. *Practice.—Instruction.—Right of Possession and of Property.*—A party desiring a more accurate statement of the issue than that made in an instruction must move for it at the time, and, failing to do so, can not be heard to complain of it on appeal; and where the right of possession is practically the right of property, an instruction, that ownership is the question in issue, is not erroneous. *Ib.*
17. *Same.—Evidence of Ownership.—Tax Schedules.*—Where the schedule of each claimant, returned for taxation after a sale bill was made, had been admitted in evidence without objection, one including and the other not showing the property claimed, it was not error for the court to exclude a return by the latter the next year, to prove that he then included it with his property. *Ib.*

REPLEVIN BAIL.

See CRIMINAL LAW, 36, 37, 40, 41; DECEDENTS' ESTATES, 14, 15.

1. *Attestation.—Justice of the Peace.*—An entry of a contract of replevin bail is not invalid, by reason of the failure of the justice to note the required attestation. *Stone v. State, ex rel.,* 235
2. *Failure of Justice to Attest Entry.—Damages.*—The failure of a justice of the peace to attest the entry of replevin bail does not relieve the bail from liability, and such failure of the justice is not such a breach of his official bond as would authorize the recovery of substantial damages. *State, ex rel., v. Trout,* 563

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See ATTACHMENT, 1; CHATTEL MORTGAGE, 4, 6 to 10; CONTRACT, 2; CONVEYANCE, 5; ESTOPPEL, 2; MORTGAGE, 14; REPLEVIN, 15; SHERIFF'S SALE; TAX TITLE, 1 to 3, 7.

SCHOOL CORPORATION.

See TOWNSHIP TRUSTEE, 1.

SCHOOL LAW.

See TOWNSHIP TRUSTEE, 4.

1. *Contract with Unlicensed Teacher to Teach School.*—A teacher can neither recover compensation for services rendered under a contract with the officers of a public school corporation, nor damages for a breach of such contract, unless he has been licensed to teach as prescribed by the statute. *Jackson School Township v. Farlow*, 118
2. *Same.*—*License.*—*Pleading.*—*Complaint.*—In an action by a teacher upon a contract entered into by him with a township trustee, the complaint must allege that he had obtained the requisite license; and an averment that he was “prepared and qualified in every particular to perform all the conditions of the contract” is not equivalent to such an allegation. *Ib.*
3. *Same.*—*License not Condition of Contract.*—The requirement that public teachers shall obtain a license is not a condition of the contract, but is a command of the law. *Ib.*
4. *Same.*—*Contract.*—*Descriptio Personæ.*—*Estoppe.*—In the introductory clause of a contract to teach school, the contracting parties were described as “M. P., trustee of J. township, and J. F., a licensed teacher.”
Held, in an action on the contract by the teacher, that the words annexed to his name are not only used by way of recital, but are merely *descriptio personæ*, and are not in the form of a stipulation, and did not estop the township trustee from asserting that the plaintiff did not have the requisite license. *Ib.*
5. *Same.*—*Township Trustee.*—A township trustee can not, by inserting a provision by way of recital in a contract, nullify the provisions of the statute. *Ib.*

SET-OFF.

See DECEDENTS' ESTATES, 25; HUSBAND AND WIFE, 3.

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See PRACTICE, 43; TRESPASS, 1.

SHERIFF.

See EXECUTION, 1; SHERIFF'S SALE.

SHERIFF'S SALE.

See CHATTEL MORTGAGE, 8 to 10; TRUSTS AND TRUSTEE, 3, 5.

1. *Purchaser.*—*Judgment.*—*Execution.*—*Notice of Irregularities.*—The purchaser at a sheriff's sale of real estate is required to show a valid judgment and execution, and is chargeable with notice of the character and contents of the judgment and execution under which he claims, and of the discrepancies between them, if any exist. *Stotsenburg v. Same*, 538
2. *Same.*—This rule applies alike to all purchasers at such sale, whether judgment plaintiff, who is affected with constructive notice of all irregularities, or a stranger to the writ, who ordinarily can be affected only by actual notice. *Ib.*
3. *Same.*—*Assignee of Certificate.*—The assignee of the certificate of sale is in no better position than his assignor. *Ib.*
4. *Same.*—*Appraisement.*—A sheriff's sale of real estate is voidable, if not void, if made without appraisement, when the judgment does not so direct. *Ib.*
5. *Same.*—*Sale in Solido of Land Susceptible of Division.*—A sale of real estate on execution, as an entirety, which is susceptible of division and of sale in parcels sufficient to satisfy the execution, is voidable, and may be set aside. *Ib.*
6. *Same.*—*Right of Holder of Junior Lien to Set Aside.*—*Mortgage.*—*Trustee of Express Trust.*—The assignees and holders in trust of a mortgage of real estate, the lien of which is junior to that of the judgment on which such real estate was sold on execution, have such an interest

as entitles them to bring an action to set aside such sale, and as trustees of an express trust, may sue in their own names. *Ib.*

SLANDER.

1. *Pleading.—Averments.*—Where the complaint in an action for slander averred that the defendant spoke "of and concerning the plaintiff" the following false and defamatory words: "I saw Lee Jones (meaning plaintiff)," etc., it is not necessary to further aver that the plaintiff was known by such name. *Hutchinson v. Lewis*, 55
2. *Same.—Complaint.—Demurrer.—Practice.*—Where, in such action, the complaint charges two sets of slanderous words, if either is sufficient, a demurrer to the complaint for want of facts should be overruled. *Ib.*
3. *Same.—Actionable Words.*—Words charging the plaintiff with being a whore are actionable *per se*. *Ib.*
4. *Same.—Statement of Witness Privileged.—Presumption of Privilege, How Overcome.*—All statements of a witness, as a general rule, are absolutely privileged; and those that are not are presumptively so, and before a witness can be held liable for statements made in a judicial proceeding, this presumption must be overcome by showing affirmatively that such statements were false and malicious. *Ib.*
5. *Same.—When Statement of Witness Privileged.—Evidence.—Malice.*—Where, in an action for slander, it is shown that the defendant was subpoenaed as a witness in a cause, testified upon the trial, and as a witness made the statement complained of, and it is not shown that the statement was impertinent and immaterial, or that it was not responsive, or that he wandered from the case to gratuitously make the statement, or that it was not relevant or not made in the faithful discharge of his duty as a witness, under these circumstances such statement is absolutely privileged; but, if it were not, it would be presumed to be, and, before a recovery could be had, malice in making the statement must be shown. *Ib.*
6. *Same.—Privileged Statements of Witness can not be Used Against Him.*—A statement made by the defendant after he had testified as a witness in a case, not actionable standing alone, and not proving any set of words declared upon in such action, can not be aided by a statement made by him as a witness, which is privileged, so as to make such former statement slanderous. *Ib.*

SIGNATURE.

See CONTRACT, 1.

SPECIAL FINDING.

See PARTNERSHIP, 2; PRACTICE, 15; PROMISSORY NOTE, 8 to 12; SUPREME COURT, 27.

1. *When Defective.—Practice.—Venire de Novo.*—The office of a special finding is to state the facts which have been proved, and, if only matters of evidence in reference to a material fact are stated, the finding is defective and may be set aside on motion for a *venire de novo*. *Parker v. Hubble*, 580
2. *Same.—Right of Possession.—Surrender.*—A special finding which states the matters of evidence concerning the right of possession of a plaintiff suing for possession, instead of the fact of his surrender, is defective and will not sustain a conclusion of law and a judgment against him. *Ib.*

SPECIAL VERDICT.

1. *Venire de Novo.—Practice.*—A special verdict is not so imperfect as to require the issue of a *venire de novo*, simply because it fails to find either for or against all of the facts put in issue by the pleadings.

Wilson v. Hamilton, 71

2. *Same.*—*Evidence.*—*Presumption.*—*Finding.*—The Supreme Court will assume, in the absence of the evidence, that the special verdict contained all the facts proved, and that the trial court properly overruled a motion for a *venire de novo* for the reason that the special verdict contained the finding of the jury upon all the facts which had been proved. *Ib.*
3. *Same.*—*Judgment.*—Where a special verdict is sufficient and free from objection, the rulings and judgment of the court thereon, which follow the verdict, will be sufficient and free from objection. *Ib.*

SPECIFIC PERFORMANCE.

See CONTRACT, 2.

STATUTE CONSTRUED.

See BASTARDY, 4; CITIES AND TOWNS, 2 to 5; CRIMINAL LAW, 1, 2, 28, 36, 40, 41, 46, 47; DECEDENTS' ESTATES, 20; GRAVEL ROAD; PARTITION, 5; PRACTICE, 44; PROMISSORY NOTE, 29; REPLEVIN, 4; STATUTE OF LIMITATIONS, 2; SUPERIOR COURT; TAX TITLE, 2; TOWNSHIP TRUSTEE, 4.

STATUTE OF FRAUDS.

See DECEDENTS' ESTATES, 5.

1. The mere passing of a new and independent consideration, from the promisee to the promisor, does not take the case out of the operation of the statute of frauds. *Holderbaugh v. Turpin*, 84
2. *Promise of Debtor.*—Where a debtor promises to pay the debt to one other than the creditor, such promise is not within the statute of frauds. *Indiana Manufacturing Co. v. Porter*, 428

STATUTE OF LIMITATIONS.

See TAX TITLE, 4.

1. *Subsequent Disability.*—The rule is, that when the statute of limitations has once begun to run, no disability subsequently arising will arrest its progress. *Kistler v. Hereth*, 177
2. *Same.*—*Statute Construed.*—Section 215 of the code, 2 R. S. 1876, p. 126, only provides for cases where the plaintiff is under legal disabilities when his cause of action accrues, and authorizes him to bring his action within two years after the disability is removed. *Ib.*
3. *Same.*—*Reply.*—*Imprisonment.*—*Legal Disability.*—In an action for damages for an assault and battery, the reply to an answer of the statute of limitations, alleged that, shortly after the commission of the injury, and while plaintiff was suffering therefrom, and confined to his room from the effects thereof, and unable to institute a suit therefor, the defendant, conspiring with others, procured, on a criminal charge, the indictment, conviction and incarceration of the plaintiff in the State's prison; that, deducting the time of said imprisonment, the action was commenced within two years after the removal of the disability occasioned by his imprisonment.

Held, that the reply was insufficient on demurrer. *Ib.*

STREET.

See CITIES AND TOWNS, 6, 7, 14, 15, 16; RAILROAD, 2; TRESPASS, 5.

SUMMONS.

See MANDATE, 6; PRACTICE, 44.

SURFACE-WATER.

See CITIES AND TOWNS, 8 to 16.

SUPERIOR COURT.

1. *Judgments of.*—*Statute Construed.*—Under section 12 of the act establishing superior courts, 2 R. S. 1876, p. 23, judgments of a superior court have in all essential particulars the same effect as those of the circuit court. *Bell v. Davis*, 314

2. *Same.—Transcript of Judgment.—Lien.*—The provisions of the act. *supra*, authorize the filing and docketing of transcripts of judgments rendered by a superior court, and upon a compliance with the law in relation thereto such judgments become a lien upon the lands of the judgment debtor situate in the county where the transcripts are filed and docketed. *Ib.*

SUPERVISOR OF HIGHWAYS.

See MANDATE, 5.

SUPREME COURT.

See APPEAL; BILL OF EXCEPTIONS, 1; CRIMINAL LAW, 10; GUARDIAN AND WARD, 3; MORTGAGE, 1, 14; PARTITION, 6; PRACTICE, 2, 7 to 10, 12, 15; PROMISSORY NOTE, 8, 20; REPLEVIN, 2; SPECIAL VERDICT, 2.

1. *Practice.—Verdict.—Evidence.—Failure of Proof.*—The rule, that the Supreme Court will not disturb a verdict when there is any evidence tending to support it, has no application to a case where there is an entire failure of proof. *Hutchinson v. Lewis*, 55
2. *Instructions.—Evidence.*—The evidence not being in the record, the Supreme Court can not say that the trial court erred in giving or refusing instructions, when the action of the court was not erroneous on any supposable state of the evidence. *Byram v. Galbraith*, 134
3. *Waiver.*—Assignments of error not discussed by counsel are regarded as waived. *Ib.*
4. *Absence of Evidence.—Verdict.*—In the absence of the evidence from the record, the Supreme Court can not know that a verdict is not sustained by the evidence, or that it is contrary to law. *Ib.*
5. *Practice.—Evidence.—New Trial.*—No question upon the exclusion of evidence can be presented in the Supreme Court unless assigned as a reason in the motion for a new trial. *Malson v. State*, 142
6. *Practice.—Default.—Objection to Amount of Damages.*—An objection to the amount of damages assessed can not be raised for the first time in the Supreme Court. After default of the party, such an objection can be made by him only by appearing in the court below and there disputing the amount of the damages. *Baldwin v. Humphrey*, 153
7. *Same.—Appeal after Judgment by Default.*—A party against whom a judgment by default has been rendered may appeal therefrom directly to the Supreme Court, without having first applied to the trial court to set aside such judgment. *Ib.*
8. *Instructions.—Evidence.—Practice.*—Instructions applicable to the evidence and stating the law correctly should be given, as requested by the defendants; but where the plaintiff, as appellee, has not appeared and furnished aid in support of his judgment, and sufficient errors have been made manifest upon the record to require a reversal, the Supreme Court will not recite all the instructions improperly refused, or undertake, at appellant's request, to decide all the questions presented as to instructions and objections to evidence. *Steele v. Davis*, 191
9. *Practice.—Pleading.—Demurrer.—Denial.—Presumption.—Evidence.*—Where a demurrer is sustained to a paragraph of answer, under which no evidence is admissible nor relief attainable, of which the defendant could not have had the benefit under the general denial pleaded therewith, it will be presumed, on appeal, that he did have such benefit under such denial. *Wood v. Crane*, 207
10. *New Trial.—Bill of Exceptions.—Record.*—Affidavits in support of a motion for a new trial, copied into the transcript, but not made a part of the record, either by an order of the court or by a bill of exceptions, will not be considered by the Supreme Court. *Ib.*

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11. **Practice.—Transcript.—Bill of Exceptions.—Date of Filing.—Ex Parte Affidavit.**—The date of filing a bill of exceptions, shown by the record below, and correctly copied into the transcript filed in the Supreme Court, can not be contradicted upon appeal by a mere *ex parte* affidavit. *Combs v. State*, 215
12. **Payment.—Weight of Evidence.**—A verdict finding that a deed was in legal effect a mortgage, and that the mortgage debt has been fully paid, will not be disturbed by the Supreme Court on the mere weight of evidence not entirely clear and satisfactory. *Lentz v. Martin*, 228
13. **Assignment of Errors.**—Causes for a new trial can not be assigned in the Supreme Court as independent errors. *Todd v. Jackson*, 272
14. **Practice.—Judgment on one Paragraph of Complaint.**—Where it is manifest that a judgment rests upon the only paragraph of a complaint containing the cause of action, it will be considered by the Supreme Court; and objections to the other paragraphs presenting no important question passed by. *Stone v. State*, 235
15. **Practice.—New Trial.—Excessive Damages.**—To present for the decision of the Supreme Court any question in relation to excessive damages, or supposed error in the assessment of the amount of recovery in the trial court, such matters must be assigned as reasons for a new trial in the motion therefor. *Warner v. Curran*, 309
16. **Practice.—Exception.—Demurrer.—Evidence.—Verdict.**—Where an exception has been saved to a ruling on the demurrer to a pleading, it can not be aided by reference either to the evidence or to the verdict. *Abell v. Riddle*, 345
17. **New Trial.—Record.**—No question is presented to the Supreme Court by the ruling on the motion for a new trial, where neither the evidence nor the instructions, nor any decision made by the court during the trial, are in the record. *Early v. Hamilton*, 376
18. **Practice.—Complaint.—Overruling Motion to Strike Out.**—The overruling of a motion to strike out part of a complaint can present no available error on appeal to the Supreme Court. *Lawless v. Harrington*, 379
19. **Bill of Exceptions.—Change of Venue.**—Where motions for a change of venue, and for leave to file answers, are overruled, the affidavit in support of such change and the answers proposed to be filed must be shown by the bill of exceptions, to present the questions to the Supreme Court. *Ib.*
20. **Same.—Extension of Time.**—Where the entire showing for and against a motion for an extension of time to file bills of exceptions is not in the record, the Supreme Court will not reverse the ruling thereon. *Ib.*
21. **Assignment of Error.—Must be Specific.**—Assignments of error to be available must be specific, and therefore an assignment to the effect that the action of the judge was oppressive, illegal and in violation of all law, and the whole judgment wrong and oppressive, is too general. *Ib.*
22. **Party Demurring Presumed in Court.**—Where both the judge of the trial court, and the person demurring to a complaint, thought he was a party to the action, the Supreme Court will presume that he was and is properly in court. *Edwards v. Beall*, 401
23. **Practice.—Trial Without Answer.—Presumption of Issue Joined.**—Where the record fails to show that issue was joined by answer of the defendant, the Supreme Court will consider the case as if an answer in denial had been filed. *Felger v. Etzell*, 417
24. **Presumption.—Record.—Complaint.**—Where a sufficient complaint is found in the record, with nothing showing that it is not properly there, the Supreme Court will presume that it came into the record regularly and rightfully. *Figart v. Halderman*, 564

25. *Practice.—Trial Court.—Presumptions.*—All the presumptions are in favor of the correctness of the trial court's rulings, and will be indulged by the Supreme Court, in the absence of any showing of positive error. *Foster v. Ward, 594*
26. *Practice.—Verdict.—Weight of Evidence.—Finding.*—The Supreme Court will not disturb the finding of the trial court or the verdict of a jury upon the mere weight or preponderance of the evidence. *Phoenix Mut. Life Ins. Co. v. Hinesley, 1; Hayden v. Cretcher, 108*
27. *General Verdict.—Special Finding.*—A judgment on a general verdict will not be disturbed by the Supreme Court, unless it be "irreconcilably inconsistent with the special finding." *Byram v. Galbraith, 134*
28. *Nominal Damages.*—The Supreme Court will not reverse a judgment where the sole question is as to the right to recover purely nominal damages. *State, ex rel., v. Trout, 563*

SURPRISE.

See CRIMINAL LAW, 23; NEW TRIAL, 3.

TAX ASSESSMENT LISTS.

See CONTRACT, 3; EVIDENCE, 2, 3.

TAX SCHEDULES.

See REPLEVIN, 17.

TAX TITLE.

See TAXES.

1. *Action to Quiet Title.—Sale for Taxes.—Adjudication.—Answer.*—In an action to quiet title to real estate, an answer, in substance, alleging that the plaintiff's title was by purchase at a tax sale in 1870, for taxes of 1868 and 1869, that no deed was executed to him until 1878, that, in an action instituted by him in 1876, against the then owners of the land, judgment was rendered annulling and setting aside the sale to him and declaring the taxes a lien thereon, and ordering its sale to pay them, that afterward so much of said judgment as declared the taxes a lien was set aside and vacated, and the title was adjudged to be in said owners, and that the defendants answering are the owners by grant from them, shows that the rights of the parties were finally settled and determined by the judgments pleaded, and contains a good defence, on demurrer. *Sohn v. Wood, 17*
2. *Same.—Lien for Taxes.—Statute Construed.*—Section 257 of the tax law of December 21st, 1872, 1 R. S. 1876, p. 129, does not apply to cases where there has been an adjudication, but declares a rule by which courts are to measure the rights of the parties when the cause comes up for judgment. *Ib.*
3. *Same.—Evidence.—Sale and Purchase.—Voluntary Payment.*—Where one claims to hold a lien for taxes paid upon the lands of another, he must show that the lands were sold for taxes, and were purchased by him at such sale. Mere voluntary payment is not enough to entitle him to a lien. *Ib.*
4. *Real Estate.—Tenants in Common.—Rents and Profits.—Statute of Limitation.—Adverse Possession.*—Where one tenant in common applied the rents and profits of the common property to the purchase of an outstanding tax certificate, and on such certificate procured a deed to himself, and by such deed claimed to be the owner of the interest of his co-tenant, or to have such color of title that he could invoke the protection of the statute of limitations applicable to tax sales, a demurrer to a paragraph of answer, pleading such statute, was correctly sustained. *Bender v. Stewart, 88*
5. *Same.*—In such case, no adverse title was procured, but the purchase must be deemed to have been made for the benefit of both. *Ib.*

6. *Same.—Partition.—Evidence.*—On trial of an action for partition, in such case, an answer that the plaintiff's claim of title was by deed, executed while the defendant was in adverse possession under a tax deed, is not sustained by evidence, that when plaintiff received his deed the premises were vacant, apparently not in possession of any one, the fences were down, the house vacant and doorless, and the defendant had removed from the State. *Ib.*
7. *Same.—Tax Sale of Real Estate of Owners of Personal Property.*—Where, on the trial of such action, there was no recital in the tax deed, nor proof *aliunde*, that the owners of the land had not sufficient personal property to satisfy the taxes for which the land was sold, a good adverse title was not shown in the purchasing tenant. *Ib.*

TAXES.

See TAX TITLE.

Exemption from.—Constitutional Law.—Answer.—Demurrer.—Evidence.—The eighth clause of section 7 of the act of December 21st, 1872, 1 R. S. 1876, p. 73, exempting an amount of property from taxation in certain cases, is unconstitutional and void, and no error is committed in sustaining a demurrer to an answer setting up such exemption, or in excluding evidence offered in support thereof. *Warner v. Curran*, 309

TENANCY FROM YEAR TO YEAR.

See LANDLORD AND TENANT, 2.

TENANTS IN COMMON.

See PARTITION; TAX TITLE, 4.

THREATS.

See CRIMINAL LAW, 11.

TITLE BOND.

See EVIDENCE, 5.

TITLE BY PURCHASE.

See ACTION IN REM; CHATTEL MORTGAGE, 4, 5, 10; ESTOPPEL, 2; REAL ESTATE, ACTION TO RECOVER, 8 to 10.

TOWNSHIP.

See TOWNSHIP TRUSTEE.

TOWNSHIP TRUSTEE.

See MANDATE, 5; SCHOOL LAW.

1. *Authority to Borrow Money.—School Corporation.*—While a township trustee has no authority to borrow money for the use of the school corporation, yet, for money borrowed and actually used for the benefit of the township, in a legitimate way, the township may be liable. *First Nat'l Bank, etc., v. Union School Tp.*, 361
2. *Liability of Township.—Complaint.*—A paragraph of complaint, in an action against a school township for money borrowed by the township trustee, which shows that the money was used for the purpose of paying corporate indebtedness, is sufficient, the liability arising not from the act of the trustee in borrowing the money and giving a note, but from the obtaining of the money and its application to the township's lawful uses. *Ib.*
3. *Promissory Note.—Corporation.—Contract.*—Where a promissory note, set forth in the complaint in an action thereon against a school township, appears upon its face to be the note of the corporation, that is, it is signed by the township trustee as trustee, is payable out of the township funds, the consideration moved to the township, and it appears the note was intended to impose an obligation upon the township, the contract should be regarded as that of the corporation, and not that of the officer whose name is signed to it. *Wallis v. Johnson School Tp.*, 368

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4. *Authority to Borrow Money.—School Law.—Statute Construed.—Case Distinguished.*—Under the provisions of the school law, 1 R. S. 1876, p. 778, a township trustee has no authority to borrow money for the use of the school township. *Bicknell v. Widner School Township*, 73 Ind. 501, distinguished. *Ib.*
5. *Promissory Note.—Complaint.*—A township trustee has no authority to borrow money for the use of his school township, but where money is thus borrowed, and actually and rightfully expended for the benefit of the school corporation, it is liable therefor; and a complaint in an action on a promissory note executed by a township trustee for money so borrowed, which fails to allege that the money was expended for the benefit of the school corporation, is insufficient. *Ib.*
6. *Action on Bond.—Civil and School Township.—Pleading.—Practice.—Amendment.—Misjoinder of Causes of Action.*—Where the original complaint in an action by a township trustee against his predecessor in office, upon his bond, sought only to recover money due the civil township, the subsequent filing of an additional paragraph of complaint, seeking to also recover money alleged to be due the school township, is a proper amendment, and does not amount to a misjoinder of separate causes of action. *Strong v. State, ex rel.*, 440
7. *Same.—Report.—Surety not Bound Thereby.*—In such action the reformation of the report of the alleged defaulting trustee is not necessary to enable the sureties on his bond to avail themselves of any error therein prejudicial to their rights as such sureties. *Ib.*

TRESPASS.

See REPLEVIN, 1 to 5.

1. *Service of Writ of Possession.—Pleading.—Complaint.—Answer.—Reply.—Departure.—Practice.*—Where a complaint contains facts constituting a cause of action against defendants for trespass in removing plaintiff's goods from his dwelling-house, and two of the defendants answer in justification under a writ of possession, a reply seeking to hold them responsible and recover damages for issuing the writ, but not connecting them with the issuing of the writ, or with the trespass, etc., is a departure, and is insufficient on demurrer. The plaintiff could not thus controvert his landlord's title.. *Steele v. Davis*, 191
2. *Same.—Practice.—Instructions.—Exemplary and Nominal Damages.*—In such an action, an instruction, that "If the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict for nominal damages," assumed that a trespass had been committed, and was erroneous. *Ib.*
3. *Same.—Compensatory Damages.—Measure of Recovery.*—In such action, an instruction, that "The amount of damages that the plaintiff is entitled to recover is not fixed by law, but left to your sound judgment and discretion," was erroneous. In an action for trespass, where only compensatory damages can be allowed, the measure of recovery is limited to the amount of the damages done or the injury inflicted. *Ib.*
4. *Same.—Justification under Writ.—Facts Assumed as Proved.—Actual Damage.*—On trial of such an action, it was error to instruct the jury that the judgment and writ of possession did not justify the acts complained of, and that when they had assessed the injury to plaintiff they should go no further to visit defendants with exemplary damages. It was error to assume that a trespass had been committed, and that plaintiff had sustained injury. *Ib.*
5. *Highway.—Locus in Quo.—Dedication.—Railroad Company.—Assent of Owner.—Street of City.—Grade of Railroad.—Bridge.—Evidence.*—In an action against a township trustee for trespass, in entering plaintiff's close and cutting down fence-posts thereon, a dedication of the

locus in quo to public uses was proved by evidence showing that a railroad company, to secure a lower grade for its road across a street forming the north boundary of a city, was to furnish a strip of plaintiff's ground for a street-crossing further north, at surface grade, and entered into negotiations with plaintiff, and agreed, not in writing, upon a price; that the company took possession of the old street-crossing, and its engineer, assisted by plaintiff, surveyed the line of the new road; that a new bridge was necessitated by the change of highway, and was constructed; and that plaintiff resided in immediate proximity to the premises occupied, and had knowledge of the use of his land for the highway as changed, from the time it commenced, although plaintiff never received payment for his land from the company or the county. Woods, J., dissents.

Campbell v. O'Brien, 222

TRUSTS AND TRUSTEE.

See DECEASED'S ESTATES; SHERIFF'S SALE, 6.

1. *Action to Quiet Title.—Real Estate.—Tenants in Common.—Conveyance.—Sale on Foreclosure of Mortgage for Purchase-Money.—Lien of Trustee.*—Where one held land conveyed to him for himself and as trustee for others, purchasing each an equal share, and, upon default of some, the mortgage for unpaid purchase-money was foreclosed, and the land, having been sold, was conveyed to the trustee by sheriff's deed, he acquired such a lien upon the share of a co-tenant in default as would authorize a decree quieting his title to such co-tenant's interest in the land, unless reimbursed *pro rata* the moneys paid for the latter, and interest thereon, within a time fixed by the court.

Adams v. La Rose, 471

2. *Same.*—Such trust was a naked trust, and the trustee, having paid his share of such purchase-money, was not guilty of a breach thereof in permitting the land to go to sale on a foreclosure of the mortgage securing the purchase-money. *Ib.*

3. *Trusts.—Married Woman.—Sheriff's Sale.—Husband and Wife.*—Where a husband purchases land with his wife's means, and takes the title in his own name without her consent, he holds it in trust for her. As between them, she is the owner, and is so as against all persons acquiring an interest therein with notice of her equity; but the title of a purchaser at a sheriff's sale of land thus equitably owned by a married woman, sold upon a judgment against the husband, if made for value and without notice of the trust, is protected by section 2 of the act concerning trusts and powers, 1 R. S. 1876, p. 915.

Gifford v. Bennett, 528

4. *Trusts.—Implied or Parol Trust.—Express Trust.*—An implied or parol trust can not be created by putting money in the hands of another, to be invested in land for the use and benefit of a third person. This can only be done by an express trust in writing. *Rooker v. Rooker*, 571

5. *Same.—Good Faith Purchaser at Sheriff's Sale.*—A good faith purchaser of real estate at sheriff's sale, without notice, or his assignee, will be protected from secret trusts and unrecorded liens. *ELLIOTT and NIBLACK, JJ.*, dissent. *Ib.*

6. *Same.—Action to Enforce Parol Trust and Quiet Title.—Notice of Trust.—Demurrer.*—In an action to enforce a parol trust and to quiet title to real estate, the complaint alleged that a married woman placed her separate personal property in the hands of her husband, in trust, to invest in real estate for her daughter, who invested it in the real estate in controversy, but took the conveyance in his own name, and had it duly recorded; that, previous to his death, for the purpose of fully executing the trust, he devised such real estate to the daughter, which will was, after his death, duly probated; that such real estate, during his lifetime, was sold on execution against him, the judgment plain-

tiff being the purchaser, and having no notice of such trust; that afterward the defendant purchased the certificate of sale and took a sheriff's deed for the land, with full knowledge of all the facts, under which deed he claims title. Prayer that the land be declared held in trust for such daughter, and that the title thereto be quieted.

Held, on demurrer, that the complaint was insufficient. *Ib.*

7. *Trustee of Express Trust.—Bond.—Sureties.*—Where, under the provisions of the act concerning trusts and powers, 1 R. S 1876, p. 915, a bond might be required of a trustee of an express trust, and a bond is executed by the trustee, with sureties, with the approval of the county clerk, conditioned for the faithful performance of the duties of the trust, such bond is valid and binding upon the trustee and his sureties. *Bates v. State, ex rel.*, 463
8. *Same.—Action on Bond.—Penalty.—Damages.*—Where a bond required the trustee to put the trust fund at interest, and annually pay the accrued interest to the beneficiary, in an action on the bond by the beneficiary to recover the accrued interest on the trust fund, which had been converted and squandered by the trustee, it is error to assess a penalty of ten per cent. on the amount found due. *Ib.*

UNSONDNESS OF MIND.

See CRIMINAL LAW, 29, 34.

USURY.

See PROMISSORY NOTE, 16, 21 to 25.

VARIANCE.

See INSURANCE, 2; PRACTICE, 2, 22.

VENDOR AND PURCHASER.

See CHATTEL MORTGAGE, 10; CONTRACT, 2; JUDGMENT, 3; MORTGAGE, 4; TRUSTS AND TRUSTEE, 1 to 3.

1. *Promissory Notes.—Pleading.—Answer.—Real Estate.—Mortgage.—Release.—Fraud.—Notice.*—An answer by the makers of promissory notes, that they were given for balance of purchase-money of real estate; that by a decree of foreclosure it had been ordered that they pay the amount in suit to a mortgagee for prior purchase-money; that before the sale and conveyance to them the mortgagor had, by fraud, procured a release from the mortgagee, of which fraud they had no knowledge at the time of their cash payment of purchase-money and of their acceptance of the conveyance; that notice of the foreclosure suit was given by them to the plaintiffs; that their vendor was and still is insolvent; and that the plaintiffs had notice of the rights of the mortgagee before the notes were assigned to them by the mortgagor, is insufficient on demurrer. *Burton v. Reagan*, 77
2. *Same.—Notice of Suit.—Makers of Notes Must Defend.—Judgment.*—Such notice by the defendants to the holders of notes does not make them parties; and the judgment is not binding upon them, although they may have caused an appeal in the defendants' names to be taken therefrom to the Supreme Court, and prosecuted to affirmance. The makers of the notes must defend and maintain them. *Ib.*
3. *Same.—Notice Before Payment Sufficient.*—Notice before actual payment of all the purchase-money is equivalent to notice before the contract, and when there has been partial payment the purchaser will be affected, *pro tanto*, as to the residue. *Ib.*
4. *Same.—Presumption.*—Notice of the fraud being admitted, in the absence of any averment that the conveyance to the defendants contained covenants of warranty, or that their vendor exhibited the release to them, or that they knew it had been obtained, or that they relied upon it, or that he practiced any fraud upon them, or that he made any statement or representation to them as to his title, the Su-

preme Court must presume that they took the land subject to the unpaid purchase-money, secured by the mortgage, and not as innocent purchasers, and hold that their answer contains no defence. *Ib.*

5. *Real Estate.—Purchase-Money.—Payment with Money to be Borrowed.*—*Pleading.—Complaint.—Demurrer.*—Where C. agreed with M., December 26th, 1877, to pay him or his creditors the purchase-money of land "as soon as the money can be procured by making a loan on said C.'s land," the complaint of M., alleging his tender of a deed April 19th, 1878, the failure of C. to pay, and that it was possible for him to have obtained a loan, through loan agents named, by mortgaging his real estate, and agreeing to pay ten per cent. interest, is sufficient on demurrer to put C. on his defence. *Mench v. Carter*, 496
6. *Same.—Reasonable Time.*—In such case, the plaintiff gave the defendant a reasonable time before tendering his deed. Query, whether the defendant did not unconditionally bind himself to procure a loan within a reasonable time. *Ib.*
7. *Mortgage.—Lien.—Conveyance.*—Where a purchaser of real estate assumes to pay a mortgage thereon as a part of the purchase-money, obtains possession under the conveyance containing the contract of assumption, in which the mortgage is accurately described, such purchaser can not, in an action to reform and foreclose the mortgage, defeat the lien thereof by showing that the real estate was inaccurately or imperfectly described in the mortgage. *Figart v. Halderman*, 564
8. *Same.—Right to Reform Deed.*—The conveyance of real estate by an inaccurate or imperfect description vests in the purchaser a right to have the deed reformed and to secure the land contracted for, and he can not hold this right and defeat the collection of the purchase-money. *Ib.*
9. *Same.—Assumption of Mortgage.—Bona Fide Purchaser.—Principal and Surety.*—One who assumes to pay a mortgage upon real estate purchased by him does not occupy the position of a subsequent *bona fide* purchaser; he is not a stranger, but a privy, and as such subject to the same equities as would prevail against his vendor. He becomes the principal debtor, and he whose debt he assumes occupies the position of surety. *Ib.*
10. *Same.—Mortgagor in Possession.*—In such case, the purchaser is virtually the mortgagor in possession, and the mere delay of the mortgagee to coerce payment of the mortgage does not prejudice the rights of such purchaser. *Ib.*
11. *Same.—Purchaser in Possession.*—A purchaser of real estate in possession can not successfully resist payment of purchase-money upon the ground that the description of the land in the conveyance is uncertain or imperfect. *Ib.*
12. *Same.—Mutual Mistake.*—A mutual mistake of the vendor and purchaser in the description of the real estate conveyed may be corrected between the original parties or privies thereto. *Ib.*

VENDOR'S LIEN.

See CONTRACT, 2; VENDOR AND PURCHASER.

VENIRE DE NOVO.

See PRACTICE, 14, 23; REAL ESTATE, ACTION TO RECOVER, 1; SPECIAL FINDING, 1; SPECIAL VERDICT, 1, 2.

When a jury has been discharged without objection to their answers to interrogatories, a motion for a *venire de novo* is too late.

Byram v. Galbraith, 134

VERDICT..

See CITIES AND TOWNS, 16; CRIMINAL LAW, 3, 9, 22; GUARDIAN AND WARD, 3; MARRIAGE PROMISE, 1; MORTGAGE, 6; PLEADING, 13; PRACTICE, 14, 23, 26 to 28; REAL ESTATE, ACTION TO RECOVER, 1; SPECIAL VERDICT; SUPREME COURT, 1, 12, 16, 26, 27.

VOLUNTARY SERVICE.

See CITIES AND TOWNS, 4.

WAIVER.

See INSURANCE, 3.

WARRANTY.

See PROMISSORY NOTE, 27.

WATERCOURSE.

1. *Natural*.—A natural watercourse is a stream of water flowing in a certain direction, through a defined channel, with bed and banks. The channel may sometimes be dry, but there must be substantial indications of the existence of a stream, ordinarily a moving body of water. *Weis v. City of Madison*, 241
2. *Ravines*.—Ravines, through which surface-water runs in times when there are heavy rainfalls, are not natural watercourses. *Ib.*
3. *Obstruction of Natural Watercourse*.—*Liability*.—If a natural watercourse is wrongfully obstructed, there is a plain liability. *Ib.*

WEIGHT OF EVIDENCE.

See PRACTICE, 13; SUPREME COURT, 12, 26.

WIDOW.

See DECEDENTS' ESTATES, 23; PARTITION, 1, to 5.

WILL.

See DECEDENTS' ESTATES, 1, 17, 18, 29, 30.

Legacy.—*Direction to Invest*.—*Bank Stock*.—A direction in a will that a legacy be put at interest must be strictly followed; and, in such case, bank stock is not a proper investment. *Gilbert v. Welsch*, 557

WITNESS.

See CRIMINAL LAW, 13, 20, 29, 31; DECEDENTS' ESTATES, 6, 8 to 10; EVIDENCE, 7, 10, 11; NEW TRIAL; SLANDER, 4 to 6.

WRITTEN INSTRUMENT.

See PLEADING, 7, 9; PRACTICE, 21; PROMISSORY NOTE, 5, 6, 26.

END OF VOL. 75.

